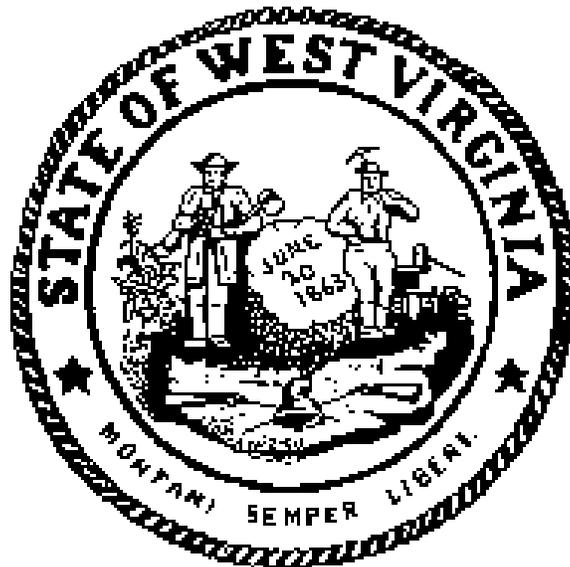


VOLUME IX OF THE WEST VIRGINIA CRIMINAL LAW DIGEST

January 2001 through July 2003



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WEST VIRGINIA PUBLIC DEFENDER SERVICES
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INTRODUCTION

This is Volume IX of the WEST VIRGINIA CRIMINAL LAW DIGEST and contains cases issued by the West Virginia Supreme Court of Appeals from January 2001 through July 2003. Indexed in Volume IX are cases affecting areas in which Public Defender Services is authorized to provide legal assistance: criminal, juvenile, child abuse and neglect, contempt, mental hygiene matters, extradition and appeals from or post-conviction challenges to the final trial of an eligible proceeding.

Volume IX is divided into different topics and is cross-indexed throughout according to the issues discussed by the Court. In briefing the cases, every attempt has been made to be faithful to the language of the Court. Nonetheless, any summary of a case is not intended to be used as a substitute for a thorough reading of the case. It should be noted as well that slip opinions may be revised before they are published and the cases may be subject to rehearing petitions. It is always safest to check with the Office of the Clerk of the Supreme Court of Appeals regarding the status of recently decided cases before relying on them for authority.

We welcome any comments or suggestions on this publication as well as any ideas you may have regarding other ways in which the Resource Center may assist you. If you detect an error in this publication, need additional copies or are interested in previously issued volumes of the Criminal Law Digest, contact Erin Akers, Criminal Law Resource Center at:

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ABUSE AND NEGLECT

Abandonment

What constitutes

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

The mother of Destiny H. asked an acquaintance, K.T., to care for her child for a period of one (1) week while she traveled to the State of Florida. The mother executed a Power of Attorney authorizing K.T. to act *in loco parentis*. The mother did not return to West Virginia on the indicated date and remained in Florida. Over the next several months, she kept in sporadic telephone contact with K.T., but did not provide financial support for the care of the child.

K.T. contacted the Department of Health and Human Resources (DHHR) to obtain financial assistance for the child. Noting the circumstances, the DHHR filed an neglect petition against the mother, citing the mother's abandonment of the child.

The mother eventually reappeared in West Virginia for the adjudicatory hearing. At this hearing, the court determined that the mother's actions did not constitute abandonment, but rather constituted a "transfer of guardianship". The guardian *ad litem* for the child and K.T. appealed this decision.

"When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syllabus Point 1, *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

The Court after evaluating the circumstances surrounding the relinquishment of custody and the mother's subsequent actions, reversed the circuit court, finding that the mother's acts qualified as abandonment under the West Virginia Code, § 49-1-3(h)(1)(A). The Court noted that the length of the absence was fifteen to sixteen times what was contemplated at the time of the initial transfer of custody, which the Court noted, "extended so far beyond the originally contemplated period as to throw into question her intent to return, her motivation to provide for the care of [the child], and [the child's] actual future". The Court also observed that the mother had maintained minimal contact during this period, and had provided nothing towards the support of the child.

ABUSE AND NEGLECT

Abuse

What constitutes

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

Adjudicatory hearing required

In re: Kyiah P. and Joseph P., ___ W.Va. ___, 582 S.E.2d 871 (No. 30971, May 21, 2003) (Per Curiam) (Reversed and Remanded)

The Department of Health and Human Resources (“DHHR”) and the *guardian ad litem* appealed the circuit court’s dismissal of an abuse/neglect petition. The petition was filed by the DHHR after the agency discovered that the mother of the respondent children had voluntarily relinquished her parental rights to at least two other children during the pendency of an abuse/neglect action in Virginia. In addition, the DHHR learned that the father of the children had been accused in Virginia of sexually abusing Samantha P., a daughter from a previous relationship.

The basis for the circuit court’s dismissal of the petition was the inability of the DHHR to present evidence at the time of the adjudicatory hearing. The DHHR had subpoenaed case workers from the state of Virginia to testify at the hearing, but the workers did not appear, citing a lack of notice. The circuit court, having continued the adjudicatory hearing on one prior occasion, refused to continue the hearing and dismissed the petition.

The appellants asserted that under *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999) (“George I”), the circuit court was obliged to conduct an evidentiary hearing regarding the allegations contained in the petition. The appellant’s acknowledged that the termination of parental rights in Virginia was a voluntary termination, and thus technically outside the language of George I, but argued that the court should have permitted them to present evidence regarding the circumstances of the Virginia matter. The appellees, however, argued that under *W.Va. Code*, § 49-6-5b (1998), the appellants were required to provide evidence of a prior involuntary termination, which did not occur in the Virginia proceedings.

The Court held that the circuit court had abused its discretion by dismissing the petition prior to conducting an adjudicatory hearing. The Court determined that the evidence presented in the petition and the preliminary hearing, indicating that the mother had previously voluntarily surrendered custody of two children, and the father had been accused of sexually abusing another child, constituted “substantial allegations of abuse” justifying an adjudicatory hearing.

Reversed and remanded.

ABUSE AND NEGLECT

Agreement relinquishing parental rights

Hearing on motion to set aside

State ex rel. Rose L. et al. v. Pancake, 209 W.Va. 188, 544 S.E.2d 403 (2001) (Starcher, J.) (Writ of Prohibition Denied)

In this abuse and neglect action, the guardian *ad litem* sought a writ of prohibition to stop the circuit court from conducting a hearing on the motion of the father to set aside an agreement to relinquish his parental rights. The father claimed that he had entered into the agreement under duress and fraud.

The Court noted that agreements to relinquish parental rights are permitted provided that they were entered into free from duress and fraud. The Court held that these issues were questions of fact to be determined by the presiding judge, and accordingly held that the circuit court had authority to conduct such hearings.

Syl. pt. 1 - "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syllabus Point 2, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984).

Syl. pt. 2 - "A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by *W.Va. Code* § 49-6-1, *et seq.*" Syllabus Point 3, *State ex rel. Paul B., v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997).

Syl. pt. 3 - Under the provisions of *W.Va. Code*, 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud.

Change of custody

In re: Frances J.A.S., et. al., ___ W.Va. ___, ___ S.E.2d ___ (No. 30909 & 30910, June 18, 2003) (Per Curiam) (Reversed and Remanded)

In this consolidated appeal, a biological father and guardian ad litem appealed the order of the circuit court ordering the dispositional placement of two children with their biological mother.

ABUSE AND NEGLECT

Change of custody (continued)

In re: Frances J.A.S., et. al. (continued)

Following a divorce, the children had been in the custody of the mother and a stepfather, but had been removed following the filing of an abuse/neglect petition and placed with their biological father in Colorado. At a subsequent placement hearings, testimony was presented from various social workers and therapists indicating that the father's home in Colorado was an appropriate residence for the children. In addition, one of the children, who was 12 years old, expressed a clear desire to remain in Colorado with her father, while the other child hinted at a similar desire. The guardian ad litem also recommended that the children remain in Colorado with their father. Nonetheless, the circuit court ordered that the children be returned to the mother's home during the pendency of a dispositional period of improvement.

The Court held that the trial court abused its discretion in not fully considering the expressed wishes of the child along with other evidence indicating that dispositional placement in the father's home might be in the best interests of the children.

Syllabus Point 3 - "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948).

Syllabus Point 4 - "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re: Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syllabus Point 5 - "To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." Syl. Pt. 2, *Cloud v. Cloud*, 161 W.Va. 45, 239 S.E.2d 669 (1977).

The Court remanded the matter, and ordered that the circuit court conduct a hearing and consider each of these factors in determining permanent placement.

Reversed and Remanded.

Consideration of wishes of children

In re: Frances J.A.S., et. al., ___ W.Va. ___, ___ S.E.2d ___ (No. 30909 & 30910, June 18, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Change of custody, (p. 3) for discussion of topic.

ABUSE AND NEGLECT

Effect of prior termination of parental rights

In re: Rebecca K.C., ___ W.Va. ___, 579 S.E.2d 718 (No. 30599, March 24, 2003) (Per Curiam) (Termination of Parental Rights Affirmed)

In September 2000, the Circuit Court of Ritchie County involuntarily terminated the parental rights of the appellant, Susie Pearl K.C., to her three children. The termination was based upon a number of factors, including the appellant's mental condition.

On June 30, 2001, the appellant gave birth to Rebecca K.C. Three weeks later, the Department of Health and Human Resources ("DHHR"), pursuant to *W.Va. Code*, 49-6-5b(a)(3) (1998), filed a petition to terminate the appellant's rights to the new-born infant. This provision requires the DHHR to file such a petition if there has been a prior involuntary termination of rights to another of a parent's children.

After, several hearings, the circuit court held that the infant was neglected and/or abused; that there was no reasonable likelihood of a correction of the conditions leading to the finding; and that granting an improvement period would be needless. The circuit court terminated the appellant's parental rights to Rebecca K.C. on December 27, 2001.

The appellant asserted on appeal that the circuit court had erred in finding the infant to be abused and/or neglected, and in further denying the appellant a period of improvement.

The Court noted that when an abuse and neglect petition is filed pursuant to *W.Va. Code*, 49-6-5b(a)(3), the circuit court must allow for the development of evidence surrounding the prior termination and examine any actions taken by the parents to remedy the circumstances leading to the prior termination.

The Court held that the circuit court had ample evidence from which to conclude that the appellant's circumstances had not sufficiently been improved since the prior termination. The Court noted that the circuit court had cited a number of continuing factors in its decision to terminate the appellant's parental rights, including the appellant's mental state, history of alcohol abuse and abusive and unstable relationships. The circuit court also noted that the appellant was residing with her parents, who had been named as respondents in the original petition and who had "contributed to and enabled" the appellant's parental deficiencies.

Under these circumstances, the Court found no abuse of discretion in the circuit court's decision to deny the appellant a period of improvement.

Affirmed.

ABUSE AND NEGLECT

Effect of stipulations of abuse/neglect

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Evaluations

In re: Daniel D., 211 W.Va. 79, 562 S.E.2d 147 (2002) (Albright, J.) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Self-incrimination, (p. 14) for discussion of topic.

Evidence

Admissibility of photographs

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

See ABUSE AND NEGLECT Findings required, (p. 11) for discussion of topic.

Evidence sufficient to terminate parental rights

Domestic violence by parent

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Drug usage by parent

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

ABUSE AND NEGLECT

Evidence sufficient to terminate parental rights (continued)

Drug usage by a parent (continued)

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Prior termination of parental rights

In re: Rebecca K.C., ___ W.Va. ___, 579 S.E.2d 718 (No. 30599, March 24, 2003) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Effect of prior termination of parental rights, (p. 5) for discussion of topic.

Self-incrimination

In re: Daniel D., 211 W.Va. 79, 562 S.E.2d 147 (2002) (Albright, J.) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Self-incrimination, (p. 14) for discussion of topic.

Failure to protect from harm by another

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

The Department of Health and Human Resources (“DHHR”) filed an abuse/neglect petition naming Amanda D., the mother of three children, as a respondent. The petition was based upon a number of referrals received by the DHHR between October 2000 and June 2001. The petition alleged, *inter alia*, that Amanda D. had failed to provide adequate clothing, housing, hygiene, and proper supervision for the children. In addition, one of the children, Tyler D., alleged that Jeff W., Amanda D.’s boyfriend, had struck him on more than one occasion, with one of the injuries causing eventual blindness in the child’s left eye.

At the adjudicatory hearing, Amanda D. stipulated to a number of the allegations in the petition and was granted a post-adjudicatory period of improvement. The DHHR subsequently requested a disposition hearing and moved for termination of Amanda D.’s parental rights. This motion was based, in part, on allegations that Amanda D.’s father had sexually abused Tyler D. during the course of visitations.

ABUSE AND NEGLECT

Failure to protect from harm by another (continued)

In re: Tyler D., Alexander A., and Nevaeh D. (continued)

At the disposition hearing, the circuit court heard testimony from a cousin of Amanda D., who indicated that despite Amanda D.'s assertion to the contrary, Jeff W. remained a part of Amanda D.'s life, and that Amanda D. had sought to have her offer false testimony at the hearing. The court also heard testimony regarding the allegations of sexual misconduct and the relative improvement of the children since their removal from their mother's custody.

The court ruled, however, that the State had not provided sufficient evidence to show that Amanda D. had not complied with the improvement period. The court also held that there was insufficient evidence to show why it was not in the best interests of the children to be returned to their mother, and accordingly, ordered that the abuse and neglect petition be dismissed. The DHHR and the guardian ad litem for the children appealed this decision.

Syllabus Point 2 - "*W. Va. Code*, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. Pt. 3, *In re: Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988)." Syllabus Point 3, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

Syllabus Point 3 - "Termination of parental rights of a parent of an abused child is authorized under *W. Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W. Va. Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.' Syl. Pt. 2, *In re: Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991)." Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

Syllabus Point 4 - "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

ABUSE AND NEGLECT

Failure to protect from harm by another (continued)

In re: Tyler D., Alexander A., and Nevaeh D. (continued)

Syllabus Point 5 - "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re: Katie S.*, 198 S.E.2d 79, 479 S.E.2d 589 (1996).

Syllabus Point 6 - "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re: Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

After disposing of a jurisdictional question necessitated by the pendency of abuse/neglect proceedings against the mother in the State of Maryland, the Court addressed the issue of whether the court's dismissal of the petition was contrary to the evidence.

The Court agreed with the assertions of the DHHR and the guardian ad litem that the court's findings and dismissal was clearly erroneous. The Court's primary rationale for this determination was based on the fact of Amanda D.'s stipulations at the adjudicatory hearing that the children had been neglected. The Court noted that the trial court had entered an order following these stipulations specifically finding that the children had been neglected. The Court also noted that the testimony offered at the disposition hearing clearly established that Tyler D. had been physically and sexually abused.

The Court also determined that the trial court had erred by not terminating Amanda D.'s parental rights. While acknowledging that there was no evidence that Amanda D. had directly abused or injured her children, the Court noted that this was instead a case of a parent's failure to protect a child from injuries from another party. The Court enumerated a number of factors supporting this conclusion, including (1) Amanda D.'s consistent and persistent denials that Tyler D. had been either sexually or physically abused; (2) her denial of neglect of the children despite her earlier stipulation to this fact; (3) her continuing relationship (and subsequent marriage) to Jeff W.; (4) her false testimony at the disposition hearing regarding that relationship; and (5) her solicitation of perjured testimony from her cousin regarding the relationship.

ABUSE AND NEGLECT

Failure to protect from harm by another (continued)

In re: Tyler D., Alexander A., and Nevaeh D. (continued)

The Court held that given these facts, primarily Amanda D.'s refusal to acknowledge the abuse and neglect of children, that there is no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected. The Court held, therefore, that Amanda D.'s parental rights should have been terminated, and remanded the matter back to the trial court for the preparation of a permanency plan.

The Court also held that the trial court had improperly prohibited the testimony of a child protective services worker during the disposition hearing. The worker was called as a witness by the guardian ad litem; however, the guardian ad litem had failed to provide a list of witnesses to the parties. The Court held that "a mere procedural technicality" should not have taken precedence over the best interests of the children.

Syllabus Point 7 - "There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process." Syllabus Point 3, *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996).

Reversed and Remanded with Directions.

Findings required

In re: Brandon Lee B., 211 W.Va. 587, 567 S.E.2d 597 (2001) (Per Curiam) (Dismissal of Petition Reversed)

See ABUSE AND NEGLECT Post-petition conditions as grounds for termination, (p. 13) for discussion of topic.

In re: Edward B., 210 W.Va. 621, 558 S.E.2d 620 (2001) (Albright, J.) (Reversed and Remanded with Directions)

See TERMINATION OF PARENTAL RIGHTS Findings required, (p. 341) for discussion of topic.

ABUSE AND NEGLECT

Findings required (continued)

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

In May of 2000, a petition was filed in the Circuit Court of Lewis County alleging that Tonjia M. was an abused and neglected child. Among the allegations in the petition were that the child had been sexually and physically abused by her father and had been exposed to pornographic materials. Following the termination of his parental rights, the respondent father sought appellate review.

The respondent asserted (1) that the trial court erred by finding that Tonjia M. was an abused or neglected child; (2) that the court erred by denying the respondent supervised visitation during the pendency of the action; (3) that the court erred by denying the respondents motion for a post-adjudicatory period of improvement; and (4) that the court erred by admitting into evidence explicit photographs from an undeveloped roll of film seized from his home.

Syllabus Point 1 - "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re: Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

The Court denied each of the appellant's assertions and affirmed the termination of his parental rights.

First, the Court recognized that while there was conflicting expert testimony as to whether the child had been sexually abused, the Court could not state that the trial court's findings were "clearly erroneous". The Court cited the conflicting expert testimony, the lay testimony, and other evidence submitted at trial but not challenged on appeal as grounds for the termination of the appellant's parental rights.

Second, the Court found that sufficient cause existed for the denial of supervised visitation. The Court noted that the appellant had been granted supervised visitation after the initiation of the proceedings. However, the appellant had demonstrated "inappropriate behavior" during the visitation, including what were described as "passionate" kisses. The Court also noted that the appellant's mother had attended the visitation and had apparently attempted to "coach" the child into modifying her earlier statements.

Third, the Court found no error in the trial court's denial of the appellant's motion for a post-adjudicatory period of improvement. The Court noted that a court has discretion to deny a motion for an improvement period when no improvement is likely. The trial court had cited the appellant's refusal to acknowledge the truth of the basic allegations, i.e., sexual abuse, as the primary grounds for the denial of the motion. Thus, since the appellant would not admit the allegations, the trial court had correctly denied the motion.

ABUSE AND NEGLECT

Findings required (continued)

In re: Tonjia M. (continued)

Finally, the Court turned to the issue of the admission of certain photographs developed from a roll of film seized from his home. The appellant complained that the roll of film was not included on the officer's inventory of the search, and that in any event, his child could not be considered to be harmed by exposure to an undeveloped roll of film. The Court denied this argument, holding that the weight of the evidence against the appellant and the lack of a jury rendered harmless any error in the admission of the photographs.

Termination of Parental Rights Affirmed.

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Guardian ad litem

Duty to advocate

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Modification of dispositional orders

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

ABUSE AND NEGLECT

Payment of therapeutic services

State ex rel. Aaron M. v. DHHR, 212 W.Va. 323, 571 S.E.2d 142 (2001) (Per Curiam) (Writ Granted)

The Court granted a writ of mandamus which sought to compel the Department of Health and Human Resources to pay for the therapeutic services of a specialist in attachment disorders. The Court ordered that the Department pay for the requested services but limited the amount of payment to the Medicaid rate applicable at the time the services were rendered.

Syl. - "A writ of mandamus will not issue unless three elements co-exist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Post adjudicatory period of improvement

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

See ABUSE AND NEGLECT Findings required, (p. 11) for discussion of topic.

Post-petition conditions as grounds for termination

In re: Brandon Lee B., 211 W.Va. 587, 567 S.E.2d 597 (2001) (Per Curiam) (Dismissal of Petition Reversed)

This case concerns an appeal by the Department of Health and Human Resources of the circuit court's decision to dismiss a child neglect petition. In dismissing the petition, the circuit court noted that the majority of the evidence alleging neglect by the mother involved incidents and conditions which had arisen after the filing of the petition, and thus violated the requirement of *W. Va. Code* § 49-6-2(c) that findings be based on conditions "existing at the time of the filing of the Petition."

The Court reversed this decision and held, in essence, that in considering a petition, a circuit court is not bound to the circumstances existing at the time of the filing of the petition, or immediately prior thereto, as indicated in *W. Va. Code* 49-6-2(c). The Court noted that, as in this case, such a petition can be amended to include post-filing situations and conduct.

In this case, a considerable amount of evidence indicated that the mother of Brandon Lee B. lacked, at the time of the petition and thereafter, the "stability, maturity, judgment and discipline necessary to provide the consistent care" that the child required. The Court noted the particular medical needs of the child and the concurrent actions of the mother, including an apparent lack of interest in the child and a felony conviction in Indiana following the child's premature birth.

ABUSE AND NEGLECT

Post-petition conditions as grounds for termination (continued)

In re: Brandon Lee B. (continued)

Syl. - "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syllabus Point 1, *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

Presence of incarcerated parent at hearing

Obligation of parent to notify court

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Standards for attendance

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Self-incrimination

In re: Daniel D., 211 W.Va. 79, 562 S.E.2d 147 (2002) (Albright, J.) (Reversed and Remanded with Directions)

In this abuse/neglect action, the father of two children appealed the termination of his parental rights. The appellants daughter alleged that her father had sexually assaulted her. Based upon these allegations, proceedings were initiated to terminate the appellants parental rights.

During these proceedings, the appellant remained silent regarding the allegations. Following the adjudicatory hearing, where the trial court found that the appellant had sexually abused his daughter, the appellant was granted a three-month improvement period. As a part of this improvement period, the court suggested that the appellant undergo a psychological evaluation. The appellant complied with this directive, but steadfastly denied to the evaluator that he had abused his daughter.

ABUSE AND NEGLECT

Self-incrimination (continued)

In re: Daniel D. (continued)

Following a ninety-day extension of the improvement period, the appellant was indicted for a number of criminal offenses arising from the previous allegations. Based on this indictment, the appellant continued to assert his right to remain silent during additional abuse and neglect proceedings. At the dispositional hearing, the court terminated the appellants parental rights. The primary basis of the termination was that the appellant had not participated in therapy and treatment as a sexual offender. According to the testimony offered at the dispositional hearing, this therapy and treatment would have required the appellant to admit to the allegations and request assistance.

On appeal, the Court noted that the appellant faced the Hobsons Choice of exercising his constitutional right to remain silent in the abuse/neglect proceeding in order to avoid self-incrimination in the criminal case. The Court embarked on a discussion of the obvious problem that arises when a person faces the conflict between the assertion of an established constitutional right and the termination of parental rights as a result of such assertion.

The Court noted the general protection afforded by *W.Va. Code*, 49-6-4 against disclosure of information in criminal proceedings of information acquired in court-ordered examinations by physicians, psychologists and psychiatrists in abuse/neglect actions. The question that arose was the admissibility of information provided to non-medical personnel, in the context of a court-ordered procedure, during the abuse/neglect action.

The Court's solution to this predicament was to state that whenever an accused is required by a court to submit to examinations by a person who is neither a physician, psychologist or psychiatrist, evidence adduced at such examinations fall under the protection of *W. Va. Code*, 57-2-3, and that the accused is entitled to have the trial courts determinations regarding these protections set forth in a protective order.

Syl. pt. 2 - Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability. Syl. Pt. 2, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

Syl. pt. 3 - West Virginia Code 49-7-1 (2000) (Repl. Vol. 2001) provides no meaningful protection of confidentiality or privilege for statements made by an accused in an abuse and neglect proceeding and is, in fact, designed to facilitate the dissemination of information to those charged with the public duty of prosecuting those who may be or are accused of criminal conduct.

ABUSE AND NEGLECT

Self-incrimination (continued)

In re: Daniel D. (continued)

Syl. pt. 6 - No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. *W.Va. Code*, 49-6-4(a) (1992). Syl. Pt. 3, *State v. James R., II*, 188 W.Va. 44, 422 S.E.2d 521 (1992).

Syl. pt. 7 - West Virginia Code 49-6-4 (1984) (Repl. Vol. 2001) was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through court-ordered psychological or psychiatric examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings.

Syl. pt. 8 - If a trial court, in the course of an abuse and neglect proceeding, requires by its order that an accused submit to an examination by a person proposed by any party as an expert who is neither a physician, psychologist or psychiatrist, such an examination is conducted under warrant of law and is, accordingly, subject to the prohibitions of West Virginia Code 57-2-3 (1965) (Repl. Vol. 1997). To the extent that our holding in *State ex rel. Wright v. Stucky*, 205 W.Va. 171, 517 S.E.2d 36 (1999), conflicts with our holding here regarding the protections afforded by West Virginia Code 57-2-3, *Stucky* is hereby modified to exclude from its holding court-ordered examinations in abuse and neglect proceedings.

Syl. pt. 9 - In an abuse and neglect proceeding, an accused required by court order to undergo an examination by an expert who is neither a physician, psychologist, or psychiatrist is entitled to have the trial court's determinations regarding the protections afforded by West Virginia Code 57-2-3 (1965) (Repl. Vol. 1997) set forth in a protective order for future reference.

The Court therefore held that the appellant was entitled to an additional improvement period to attempt to comply with evaluation and treatment, and remanded the case.

[**Note:** the Court emphasized that this opinion applied only to court-ordered examinations, and not to investigations prior to the filing of a petition, other contacts with DHHR personnel, or statements made in MDT meetings.]

Standard of review

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

ABUSE AND NEGLECT

Standard of review (continued)

In re: Rebecca K.C., ___ W.Va. ___, 579 S.E.2d 718 (No. 30599, March 24, 2003) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Effect of prior termination of parental rights, (p. 5) for discussion of topic.

Change of custody

In re: Frances J.A.S., et. al., ___ W.Va. ___, ___ S.E.2d ___ (No. 30909 & 30910, June 18, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Change of custody, (p. 3) for discussion of topic.

Termination of parental rights

Abandonment

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

Based on drug usage by parent

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

The appellant, Christina L., was the mother of three infant children. In June 2001, the DHHR filed an abuse/neglect petition, citing fifteen (15) separate counts of abuse and/or neglect. The primary allegation concerned alleged marijuana use by Christina L. in the presence of one or more of her children. This allegation was based upon a incident where school officials had confiscated a marijuana pipe from Aaron Thomas M., who demonstrated an ability to “use, take apart and clean” the pipe.

At the adjudicatory hearing, the trial court determined that the evidence of the child’s familiarity with the marijuana pipe indicated that the device had been repeatedly used in the child’s presence, and that this factor, in conjunction with chronic truancy and other factors, constituted abuse and neglect.

The mother was granted a post-adjudicatory period of improvement and was required to participate in a substantial number of programs and classes as part of the improvement period. She apparently failed to comply with many of the terms of the improvement period, which was terminated on November 28, 2001.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Based on drug usage by parent (continued)

In re: Aaron Thomas M. (continued)

A dispositional hearing was held and, on January 8, 2002, the circuit court terminated Christina L.'s parental rights. The court cited her continued drug use and addiction, and that she had not followed through with the appropriate treatment designed to improve parental functioning. In terminating her parental rights, the court found that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future.

Christina L. appealed the dispositional order, and cited four assignments of error: (1) that the court erred in finding that she had used controlled substances in the presence of her children; (2) that the court improperly concluded that such use, if true, constituted abuse; (3) that the court erroneously required her to testify during the adjudicatory hearing; and (4) that the court improperly terminated her parental rights.

The Court denied relief on each of these grounds. First, the Court held that the trial court was not "clearly erroneous" in finding that there was clear and convincing evidence that she had used controlled substances in the presence of her children. The Court adopted the trial court's rather marginal holding that Aaron's familiarity with the pipe, taken in conjunction with the mother's repeated failure of drug tests, led to a reasonable inference that Christina had repeatedly used the pipe in Aaron's presence.

Second, the Court adopted the trial court's conclusion that the mother's alleged use of marijuana constituted abuse. Determining that the court's finding was not clearly erroneous, the Court pointed to the child's familiarity with the workings of the marijuana pipe as validating the DHHR's assertion that the mother's substance abuse constituted "emotional injury", and justified a finding of abuse.

Third, the Court held that while it was error for the trial court to grant Christina L. "use immunity" and compel her to testify during the adjudicatory hearing, the error was invited and therefore waived. The Court based this conclusion on a portion of the record which indicated that counsel for Christina L. had stated that the trial court's grant of use immunity would "overcome" his objection to his client's testimony. (The Court also held that even if the issue had been properly preserved, the error would have been deemed harmless.)

Finally, the Court concurred with the trial court's finding that termination of Christina L.'s parental rights was appropriate. The Court noted that under West Virginia Code, § 49-6-5(b) (1998) (Repl. Vol. 2001), drug abuse and a parent's failure to comply with a family case plan can constitute sufficient grounds for termination of parental rights.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Based on drug usage by parent (continued)

In re: Aaron Thomas M. (continued)

Syllabus Point 2 - "A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syllabus point 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966).

Syllabus Point 3 - "As a general rule the least restrictive alternative regarding parental rights to custody of a child . . . will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened[.]" Syllabus point 1, in part, *In re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 4 - "Termination of parental rights . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code* § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, in part, *In re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Termination of Parental Rights Affirmed.

Based upon failure to protect

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Based upon fifth amendment assertion

In re: Daniel D., 211 W.Va. 79, 562 S.E.2d 147 (2002) (Albright, J.) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Self-incrimination, (p. 14) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Continuing obligation to pay child support

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Effect of oral relinquishment

In re: Tessla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

Findings required

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

See ABUSE AND NEGLECT Findings required, (p. 11) for discussion of topic.

Less restrictive alternatives

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

When adjudicatory hearing required

In re: Kyiah P. and Joseph P., ___ W.Va. ___, 582 S.E.2d 871 (No. 30971, May 21, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT When adjudicatory hearing required, (p. 2) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

When adjudicatory hearing required (continued)

In re: Kristopher E. and Kenneth C. E., 212 W.Va. 393, 572 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Adjudication not required, (p. 343) for discussion of topic.

Use of post-petition conditions as grounds

In re: Brandon Lee B., 211 W.Va. 587, 567 S.E.2d 597 (2001) (Per Curiam) (Dismissal of Petition Reversed)

See ABUSE AND NEGLECT Post-petition conditions as grounds for termination, (p. 13) for discussion of topic.

Visitation during pendency of proceedings

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

See ABUSE AND NEGLECT Findings required, (p. 11) for discussion of topic.

Voluntary relinquishment

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

In re: Tesla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

ABUSE AND NEGLECT

Voluntary relinquishment (continued)

Adjudicatory hearing not required

In re: Kristopher E. and Kenneth C. E., 212 W.Va. 393, 572 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Adjudication not required, (p. 343) for discussion of topic.

Voluntary v. involuntary termination

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

When required to be in writing

In re: Tesla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

ABUSE OF DISCRETION

Duty of court to conduct competency hearing

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Evidentiary rulings

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

Pre-sentencing competency hearing

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Standard of review

Duty of court to conduct competency hearing

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Evidentiary rulings

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

ABUSE OF DISCRETION

Standard of review (continued)

Evidentiary rulings (continued)

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Instructions

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS "Missing witness" instruction, (p. 201) for discussion of topic.

Jury bias

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

ABUSE OF DISCRETION

Standard of review (continued)

Jury bias (continued)

State v. Johnston, 211 W.Va. 293, 565 S.E.2d 415 (2002) (Per Curiam) (Conviction Reversed)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 219) for discussion of topic.

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Parole hearings

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

Plea agreements of co-defendants

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Pre-sentencing competency

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

ABUSE OF DISCRETION

Standard of review (continued)

Remand to magistrate court

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

Severance

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

Standby counsel

State v. Powers, 211 W.Va. 116, 563 S.E.2d 781 (2001) (Davis, J.) (Affirmed)

See ATTORNEYS Standby counsel, (p. 72) for discussion of topic.

AGREEMENT ON DETAINERS

Federal statutory construction

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

See AGREEMENT ON DETAINERS Time limits, (p. 27) for discussion of topic.

Remedy for violation of

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

See AGREEMENT ON DETAINERS Time limits, (p. 29) for discussion of topic.

Time limits

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

This case concerns the Court's interpretation of the Interstate Agreement on Detainers Act, *W.Va. Code* 62-14-1 to -7 (2000), and more particularly the specific credit for time served to which the appellant was entitled under the Act.

The appellant was arrested in late 1998 for felony charges in Nicholas County. After posting bond, the appellant traveled to North Carolina, where he was arrested on other charges on February 7, 1999. The appellant's mother, the surety on his Nicholas County bond, requested a bailpiece on March 18, 1999 and verbally advised the Nicholas County authorities as to the appellant's location in North Carolina. However, Nicholas County did not file a formal detainer on the appellant until September 15, 1999.

The appellant remained incarcerated in North Carolina until mid-October 1999, when he was returned to West Virginia following the termination of his criminal proceedings in North Carolina. He posted bond on the Nicholas County charges on November 5, 1999 and remained free on bond until August 8, 2000, when he was jailed following his plea of guilty to the underlying charges. The appellant was sentenced on October 6, 2000 to a term of one-to-three years imprisonment. The appellant was given credit for 106 days incarceration, being the time between the filing of the Nicholas County detainer and his posting of bond, and the time between his plea and sentencing date.

The appellant's primary claim on appeal is that the Nicholas County authorities did not act quickly enough in filing the detainer after being advised of the appellant's whereabouts by the appellant's mother. The appellant also claimed that he was entitled to credit for time served from the time of the bailpiece to the filing of the Nicholas County detainer.

AGREEMENT ON DETAINERS

Time limits (continued)

State v. Gamble (continued)

The Court reviewed the appellant's claim in light of its ruling in *State v. Somerlot*, 209 W.Va. 125, 544 S.E.2d 52 (2000). In *Somerlot*, the Court held, in accordance with *Fex v. Michigan*, 507 U.S. 43, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993), that in order for the 180-day time limit in the Interstate Agreement on Detainers (IAD) to apply, a prisoner must strictly comply with the procedures set forth therein in order to trigger its application.

The Court stated that the appellant had failed to comply with the notice requirements of the IAD. Specifically, the Court held that a request for a bailpiece did not act as a prisoner's "written request for a final disposition" under *W.Va. Code* 62-14-1, and therefore the authorities in Nicholas County were under no duty to act earlier in securing the appellant's presence.

Syl. pt. 3 - "Where one indicted for a felony in this state has been incarcerated in another state, the prosecuting authorities in this jurisdiction, pursuant to the provisions of *W.Va. Code*, 1931, 62-14-1, as amended, are under a mandatory duty to apply to the authorities of the incarcerating state for temporary custody of said accused for the purpose of offering him a speedy trial and the failure of the state to so act will cause the terms during which he was so imprisoned to be chargeable against the state under *W.Va. Code*, 1931, 62-3-21, as amended." Syl. pt. 2, *State ex rel. Stines v. Locke*, 159 W.Va. 292, 220 S.E.2d 443 (1975).

Syl. pt. 4 - "*W.Va. Code* 62-3-21 [1959], imposes a duty on the state to exercise reasonable diligence to procure temporary custody of the defendant who has fled the state for the purpose of offering him a speedy trial once the defendant's out-of-state whereabouts become known." Syl. pt. 2, *State ex rel. Boso v. Warmuth*, 165 W.Va. 247, 270 S.E.2d 631 (1980), overruled on other grounds, *State ex rel. Sutton v. Keadle*, 176 W.Va. 138, 342 S.E.2d 103 (1985).

Syl. pt. 5 - "The 180-day time period set forth in Article III(a) of the Interstate Agreement on Detainers Act, West Virginia Code §§ 62-14-1 to -7 (2000), does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and to the prosecuting officer of the jurisdiction that lodged the detainer against him." Syl. pt. 2, *State v. Somerlot*, 209 W.Va. 125, 544 S.E.2d 52 (2000).

Syl. pt. 6 - Where an accused party is free on bail from a West Virginia jurisdiction, but incarcerated in another state, a request by that accused party's surety for a bailpiece under *W.Va. Code* § 62-1C-14 (1965), does not act as the accused party's "written request for a final disposition" as required by the Interstate Agreement on Detainers, *W.Va. Code* § 62-14-1, et seq., (1971).

AGREEMENT ON DETAINERS

Time limits (continued)

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was indicted in Doddridge County on February 14, 2000 for several counts of breaking and entering and a single count of destruction of property. Shortly after this indictment, the appellant was prosecuted in the State of Ohio and was sentenced to a prison term. On May 2, 2000, the prosecuting attorney of Doddridge County filed a detainer against the appellant with the Ohio correctional institution where the appellant was incarcerated.

The appellant sent his formal request for final disposition to both the prosecuting attorney and the circuit court of Doddridge County. This request was received on June 6, 2000. The appellant was transported to Doddridge County on October 11, 2000 and was arraigned on the indictment. The appellant pleaded “not guilty” to the charges in the indictment, and the trial court set jury selection for the appellant’s trial for January 2, 2001.

On December 7, 2000, the appellant filed a motion to dismiss the indictment. The basis for the appellant’s motion was that the state had failed to bring him to trial within the 180-day period mandated by Article III(a) of the Interstate Agreement on Detainers (West Virginia Code, § 62-14-1, *et. seq.*). The trial court denied this motion on January 8, 2001. The appellant then entered a conditional plea of guilty to four counts of breaking and entering and was sentenced to one to ten year terms on each of the counts. The appellant reserved the right under the plea to appeal the trial court’s denial of his motion to dismiss.

The Court determined that the provisions of Article III(a) and Article V(c) of the Interstate Agreement on Detainers (IAD) mandated dismissal of the indictment. The Court noted that under these provisions, the 180-day rule commences when an inmate’s request for final disposition is delivered to the appropriate authorities in the requesting state. Thus, the Court determined that the 180-day period for the appellant herein had expired on December 3, 2000.

The Court noted that it was incumbent on the prosecuting attorney to alert the trial court to the implications of the IAD, noting that, “only the prosecuting attorney... had both the legal knowledge that the IAD was implicated in this case *and* the factual knowledge of when the Article III time frame commenced.” [emphasis in original]

AGREEMENT ON DETAINERS

Time limits (continued)

State v. Seenes (continued)

Syllabus Point 1 -“Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syllabus point 1, *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

Syllabus Point 2 -“The failure of the State to bring the accused to trial within 180 days following the State's receipt of the petitioner's notice of imprisonment and request for final disposition of the case, pursuant to the Agreement on Detainers, *W.Va. Code*, 62-14-1, article III(a) and article V(c) [1971], mandates the dismissal of the indictments pending against the petitioner” Syllabus, in part, *State ex rel. Modie v. Hill*, 191 W.Va. 100, 443 S.E.2d 257 (1994).

Thus, since the state had failed to bring the appellant to trial within the time frame specified in the IAD, the Court determined that the trial court had erred by refusing to grant the appellant's motion for dismissal.

Reversed and remanded for dismissal.

APPEAL

Abuse and neglect

Standard of review

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

In re: Kristopher E. and Kenneth C. E., 212 W.Va. 393, 572 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Adjudication not required, (p. 343) for discussion of topic.

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Admission of expert testimony

Standard of review

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

APPEAL

Competency of defendant

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Conclusions of law

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

Confession of error

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

Cumulative error

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Denial of parole

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

APPEAL

Double jeopardy

Standard of review

State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002) (Per Curiam) (Reversed and Remanded)

See DOUBLE JEOPARDY Multiple punishment, (p. 120) for discussion of topic.

Driving under the influence

Standards for intoxilyzer test

Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687 (2002) (Per Curiam) (Affirmed)

See DRIVING UNDER THE INFLUENCE Intoxilyzer test, Standards for test, (p. 126) for discussion of topic.

Due process

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 177) for discussion of topic.

Standard of review

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 177) for discussion of topic.

Evidentiary rulings

Deprivation of key rights

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

APPEAL

Findings of fact

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

Habeas corpus

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Procedures to determine, (p. 87) for discussion of topic.

Harmless error

State v. Flipppo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

Indictment

Sufficiency of

State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001) (Per Curiam) (Reversed and Remanded, with Directions)

See INDICTMENT Sufficiency of, Driving on a revoked license - DUI related, (p. 193) for discussion of topic.

Instructions

Refusal to give requested instruction

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

APPEAL

Instructions (continued)

Standard of review

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS “Missing witness” instruction, (p. 201) for discussion of topic.

Invited error

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

Juror bias

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

State v. Johnston, 211 W.Va. 293, 565 S.E.2d 415 (2002) (Per Curiam) (Conviction Reversed)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 219) for discussion of topic.

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

APPEAL

Magistrate court

State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379 (2002) (Albright, J.) (Conviction Vacated and Remanded)

See APPEAL Record for appeal, (p. 37) for discussion of topic.

Motion for new trial

Standard of review

State v. Varner, 212 W.Va. 532, 575 S.E.2d 142 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Pending criminal charges, (p. 222) for discussion of topic.

Parole revocation

State ex rel. Patton v. Rubenstein, ___ W.Va. ___, 582 S.E.2d 743 (No. 30967, February 28, 2003) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Standard for revocation, (p. 257) for discussion of topic.

Per curiam opinions

Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001) (Albright, J.) (Affirmed)

In this civil case, the Court addressed the status of Per Curiam opinions as support and precedent.

Syl. pt. 2 - This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.

Syl. pt. 3 - Per Curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a Per Curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases.

Syl. pt. 4 - A Per Curiam opinion may be cited as support for a legal argument.

This opinion would seem to settle the much-debated issue regarding the use and validity of Per Curiam opinions as legal precedent.

APPEAL

Plain error

Sua sponte recognition of

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

What constitutes

State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002) (Per Curiam) (Reversed and Remanded)

See DOUBLE JEOPARDY Multiple punishment, (p. 120) for discussion of topic.

Reconsideration of sentence

Standard of review

State v. Manley, 212 W.Va. 509, 575 S.E.2d 119 (2002) (Per Curiam) (Affirmed)

See SENTENCING Proportionality, Sentences with fixed maximum period of incarceration, (p. 313) for discussion of topic.

State v. Redman, ___ W.Va. ___, 578 S.E.2d 369 (No. 30534, February 28, 2003) (Per Curiam) (Affirmed)

See SENTENCING Reconsideration of sentence, (p. 315) for discussion of topic.

Record for appeal

State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379 (2002) (Albright, J.) (Conviction Vacated and Remanded)

The appellant, Chester Chanze, was charged in magistrate court with petit larceny and two other misdemeanor offenses. The appellant was convicted of petit larceny following a jury trial and appealed the conviction to the circuit court. Counsel soon discovered, however, that the electronic record of the jury trial, as required by statute, was completely defective. Counsel filed a timely motion for a new trial, citing as grounds the lack of a meaningful record from the magistrate court. The circuit court denied this motion and instead conducted a *de novo* bench trial, which resulted in the affirmation of the appellant's conviction.

APPEAL

Record for appeal (continued)

State v. Chanze (continued)

The Court vacated this decision and remanded the case back to circuit court for the entry of an order directing a new jury trial in magistrate court.

Implicit in the Court's holding was the recognition that a defendant is entitled to a meaningful appellate review of a magistrate court jury trial. The Court equated this right to the right of those defendants appealing to the Court from circuit court jury trials, and cited *State v. Neal*, 172 W.Va. 189, 304 S.E.2d 342 (1983) in noting that the Court had ordered new jury trials for matter in which the appellate record was nonexistent. The Court noted the inherent due process concerns in providing a criminal defendant with "an unintelligible record which is so extensively flawed" that counsel could not prepare a substantive appeal.

Syl. pt. 1 - "The failure of the state to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State, will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial." Syl. Pt. 2, *State ex rel. Kisner v. Fox*, 165 W.Va. 123, 267 S.E.2d 451 (1980).

Syl. pt. 2 - When an electronic record of a magistrate court jury trial in a criminal case is so defective that no record or virtually no record is available from which to prepare an appeal or to conduct appellate review, the criminal defendant is entitled to obtain meaningful review of the magistrate court proceedings by informing the circuit court of the faulty record and reconstructing the record or, if reconstruction is impossible, receiving a new trial by jury in magistrate court.

The Court therefore held that under *Kisner*, the appellant was entitled to a new trial.

Sentencing

Standard of review

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. Brewster, ___ W.Va. ___, 579 S.E.2d 715 (No. 30598, March 18, 2003) (Per Curiam) (Affirmed)

See SENTENCING Right of allocution, (p. 317) for discussion of topic.

APPEAL

Sentencing (continued)

Standard of review (continued)

State v. Manley, 212 W.Va. 509, 575 S.E.2d 119 (2002) (Per Curiam) (Affirmed)

See SENTENCING Proportionality, Sentences with fixed maximum period of incarceration, (p. 313) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

Standard of review

State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) (Per Curiam) (Affirmed)

See DRIVING WHILE REVOKED Use of foreign revocation to support conviction, (p. 133) for discussion of topic.

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

Abuse and neglect

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

In re: Brian James D., 209 W.Va. 537, 550 S.E.2d 73 (2001) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Criminal activity, Effect of, (p. 338) for discussion of topic.

APPEAL

Standard of review (continued)

Abuse and neglect (continued)

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

In re: Kristopher E. and Kenneth C. E., 212 W.Va. 393, 572 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Adjudication not required, (p. 343) for discussion of topic.

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Admission of expert testimony

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Attorney disciplinary proceedings

Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 566 S.E.2d 245 (2002) (Per Curiam) (Six Month Suspension with Conditions; Subsequently Modified to Sixty-day Suspension)

See ATTORNEYS Discipline, Financial loan from client, (p. 57) for discussion of topic.

APPEAL

Standard of review (continued)

Competency of defendant

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Cumulative error

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Denial of parole

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

Double jeopardy

State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002) (Per Curiam) (Reversed and Remanded)

See DOUBLE JEOPARDY Multiple punishment, (p. 120) for discussion of topic.

Evidentiary rulings

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Extraordinary writ

State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001) (McGraw, C.J.) (Writ of Prohibition Granted)

See JURY TRIAL Magistrate court, (p. 232) for discussion of topic.

APPEAL

Standard of review (continued)

Factual findings

In re: Brandon Lee B., 211 W.Va. 587, 567 S.E.2d 597 (2001) (Per Curiam) (Dismissal of Petition Reversed)

See ABUSE AND NEGLECT Post-petition conditions as grounds for termination, (p. 13) for discussion of topic.

Habeas corpus

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Procedures to determine, (p. 87) for discussion of topic.

Ineffective assistance of counsel

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally, (p. 64) for discussion of topic.

Instructions

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS “Missing witness” instruction, (p. 201) for discussion of topic.

Interpretation of statute

State v. Cavallaro, 210 W.Va. 237, 557 S.E.2d 291 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See RECIDIVIST OFFENSES Procedure for filing information, (p. 289) for discussion of topic.

APPEAL

Standard of review (continued)

Interpretation of statute (continued)

State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) (Per Curiam) (Affirmed)

See DRIVING WHILE REVOKED Use of foreign revocation to support conviction, (p. 133) for discussion of topic.

Jury bias

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Motion for new trial

State v. Varner, 212 W.Va. 532, 575 S.E.2d 142 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Pending criminal charges, (p. 222) for discussion of topic.

Parole revocation

State ex rel. Patton v. Rubenstein, ___ W.Va. ___, 582 S.E.2d 743 (No. 30967, February 28, 2003) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Standard for revocation, (p. 257) for discussion of topic.

APPEAL

Standard of review (continued)

Photographs

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

Prosecutorial misconduct

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Question of law

State v. Cavallaro, 210 W.Va. 237, 557 S.E.2d 291 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See RECIDIVIST OFFENSES Procedure for filing information, (p. 289) for discussion of topic.

State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) (Per Curiam) (Affirmed)

See DRIVING WHILE REVOKED Use of foreign revocation to support conviction, (p. 133) for discussion of topic.

Reconsideration of sentence

State v. Manley, 212 W.Va. 509, 575 S.E.2d 119 (2002) (Per Curiam) (Affirmed)

See SENTENCING Proportionality, Sentences with fixed maximum period of incarceration, (p. 313) for discussion of topic.

State v. Redman, ___ W.Va. ___, 578 S.E.2d 369 (No. 30534, February 28, 2003) (Per Curiam) (Affirmed)

See SENTENCING Reconsideration of sentence, (p. 315) for discussion of topic.

APPEAL

Standard of review (continued)

Sentence correction

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

Sentencing

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

Standards for intoxilyzer test

Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687 (2002) (Per Curiam) (Affirmed)

See DRIVING UNDER THE INFLUENCE Intoxilyzer test, Standards for test, (p. 126) for discussion of topic.

Statute or administrative rule

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

See AGREEMENT ON DETAINERS Time limits, (p. 29) for discussion of topic.

Sufficiency of evidence

State v. Headley, 210 W.Va. 524, 558 S.E.2d 324 (2001) (Per Curiam) (Conviction Vacated)

See DEFENSES Self-defense, Test for, (p. 107) for discussion of topic.

APPEAL

Standard of review (continued)

Sufficiency of indictment

State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001) (Per Curiam) (Reversed and Remanded, with Directions)

See INDICTMENT Sufficiency of, Driving on a revoked license - DUI related, (p. 193) for discussion of topic.

Suppression motion

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

Statute or administrative rule

Standard of review

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

See AGREEMENT ON DETAINERS Time limits, (p. 29) for discussion of topic.

Sufficiency of evidence

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

Suppression motion

Standard of review

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

APPEAL

Termination of parental rights

Standard of review

In re:Tesla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

Use of per curiam opinions

Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001) (Albright, J.) (Affirmed)

See APPEAL Per curiam opinions, (p. 36) for discussion of topic.

ARREST

Warrantless arrest

Standards

State v. Davisson, 209 W.Va. 303, 547 S.E.2d 241 (2001) (Per Curiam) (Affirmed)

Following a single vehicle accident, the defendant was approached in his driveway and was questioned by the investigating officer. The defendant had been identified by neighbors as having been the driver and sole occupant of the vehicle. Following the administration of field sobriety tests, the defendant was arrested and charged with driving under the influence, second offense.

The Court addressed the issue of the warrantless arrest of the defendant. The Court found that the normal standards for a warrantless arrest in the home enumerated in *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987) (probable cause and exigent circumstances) did not exist in this case due to the fact that the defendant was not in his home, but rather in his driveway. The Court therefore found the arrest to be lawful.

The defendant also argued that he was entitled to retroactive application of *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999), regarding stipulation of prior offenses in driving under the influence cases. The Court dealt summarily with this issue in stating that *Nichols* expressly held that the decision therein could not be applied retroactively.

Syl. pt. 2 - "Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence." Syllabus, *Simon v. West Virginia Dep't of Motor Vehicles*, 181 W.Va. 267, 382 S.E.2d 320 (1989).

Syl. pt. 3 - "*W.Va. Code*, § 17C-5A-1a (a) (1994) does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person." Syl. Pt. 3, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

Syl. pt. 4 - "A warrantless arrest in the home must be justified not only by probable cause, but by exigent circumstances which make an immediate arrest imperative." Syl. Pt. 2, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

ARREST

Warrantless arrest (continued)

Standards (continued)

State v. Davisson (continued)

Syl. pt. 5 - "When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled. Syl. Pt. 3, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999).

ATTORNEYS

Amount of fees

Lawyer Disciplinary Board v. Morton, 212 W.Va. 165, 569 S.E.2d 412 (2002) (Per Curiam)
(Charge Dismissed)

The respondent attorney was retained by David Willis to represent him in relation to certain personal injuries that he had sustained in an automobile accident. A contingency fee contract was executed by the parties, which stated, *inter alia*, that the attorney would receive thirty (30%) per cent of all monies recovered from any source prior to a lawsuit. Over the next several months, the attorney performed approximately forty (40) hours of work in investigating the case and preparing for potential litigation.

During the course of this work, the insurer of the automobile in which Mr. Willis was riding forwarded a check in the amount of \$5,000.00 to the attorney as payment for certain medical expenses. Pursuant to the contingency agreement, the attorney retained 30% of this amount, or \$1,500.00. The attorney/client relationship was terminated shortly thereafter because of the client's inability to pay a deposit towards costs and expenses. The client subsequently filed an ethics complaint against the attorney, alleging that the fee of \$1,500.00 retained by the attorney was excessive. The Hearing Panel Subcommittee concurred with this assertion, noting that the fee was "grossly excessive for the services actually performed", and recommended a public reprimand and restitution.

The Court rejected this recommendation, and dismissed the charge against the attorney. The Court reviewed the standards regarding the reasonableness of fees set forth in *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986). Specifically, the Court differentiated between contingency fee agreements on matters involving a "significant degree of risk", as opposed to those matters where the lawyer's assistance is minimal, or involves little risk. In this matter, the Court concluded that the attorney had agreed to fully represent Mr. Willis in attempting to recover damages for the injuries received in the accident. The Court noted that the agreement was not merely an agreement to attempt to recover only medical payments, but that the agreement could have exposed the attorney to the risk of litigation with the possibility of recovering no fees whatsoever. Finally, the Court noted that the fee represented an hourly rate of \$37.50, which the court noted could not be characterized as excessive.

Syl. pt. 3 - "In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of [Rule 1.5(a) of the Rules of Professional Conduct]." Syl. Pt. 3, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

ATTORNEYS

Amount of fees (continued)

Lawyer Disciplinary Board v. Morton (continued)

Syl. pt. 4 - "If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is 'clearly excessive' within the meaning of [Rule 1.5 of the Rules of Professional Conduct], even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee." Syl. Pt. 2, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

Annulment of law license

Lawyer Disciplinary Board v. Lusk, 212 W.Va. 456, 574 S.E.2d 788 (2002) (Per Curiam) (License to Practice Law Annulled)

The respondent attorney was the subject of four (4) separate ethics complaints filed by various individuals.

Lula Bell Webb - In 1995, while the attorney was the Chief Public Defender of McDowell County, the attorney accepted \$9,500.00 to represent a defendant in a prosecution for murder. The attorney subsequently left the Public Defenders Office and was designated as court-appointed counsel in the case. The attorney did not refund any portion of the fee to Ms. Webb, and avoided her inquiries as to a refund of the fee.

Melissa Anderson - The attorney was hired by Ms. Anderson in 1999 to represent her in a divorce and child custody proceeding. The attorney was paid a retainer of \$1,500.00 for his services. Apart from his attendance at an early custody hearing, the attorney took no other action on the case, and did not respond to a number of letters and telephone calls regarding the matter. Following the filing of the ethics complaint, the attorney refunded the \$1,500.00 to Ms. Anderson.

William Winchell - Mr. Winchell paid the attorney \$600.00 to represent him in a child support modification proceeding. The attorney neglected the case and was discharged. The attorney failed to respond to letters and telephone calls from Mr. Winchell regarding a refund of the fee. After the ethics complaint was filed, the attorney refunded the full amount to Mr. Winchell.

Harold Wolfe - Mr. Wolfe performed investigative services for the attorney in a criminal case. The cost for these services was \$607.48. The Circuit Court of Mercer County approved payment of the expenses, and funds for the payment of the expenses were sent to the attorney by Public Defender Services. However, the attorney did not pay Mr. Wolfe for his services, and allegedly did not pay him for services in other cases.

ATTORNEYS

Annulment of law license (continued)

Lawyer Disciplinary Board v. Lusk (continued)

The attorney responded only to the complaint filed by Ms. Webb, and did not file a response to the Statement of Charges (and Amended Statement of Charges) filed by the Investigative Panel. Based on the attorney's failure to file a response, the hearing Panel Subcommittee deemed admitted the factual allegations contained in the Statements.

The attorney was charged with several violations of the Rules of Professional Conduct. Based upon these violations and the aggravating circumstances surrounding these violations, the hearing Panel Subcommittee recommended that the attorney's license be annulled and that he be ordered to pay restitution to various clients.

Syllabus Point 1 - "A de novo standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar [currently, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative and substantial evidence on the whole record." Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syllabus Point 2 - "In order to expedite the investigation of an ethics complaint by the Bar, an attorney's failure to respond to a request for information concerning allegations of ethical violations within a reasonable time will constitute an admission to those allegations for the purposes of the disciplinary proceeding." Syl. pt. 2, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992).

Syllabus Point 3 - "Rule 3.16. of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: 'In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system or to the profession; (2) whether the lawyer acted intentionally, knowingly or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.'" Syl. pt. 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998).

ATTORNEYS

Annulment of law license (continued)

Lawyer Disciplinary Board v. Lusk (continued)

The Court agreed with the Hearing Panel Subcommittee that the attorney's failure to cooperate during the disciplinary process permitted the Subcommittee, and thus the Court, to accept the factual allegations set forth in the complaints as accurate. The Court thus determined that the only issue to be considered was the issue of appropriate sanctions.

The Court found that the attorney had violated all four of the factors set forth in *Jordan*. Specifically, the Court held that the first two factors were violated by the attorney's neglect of the cases of Ms. Anderson and Mr. Winchell, and the attorney's refusal to reply to the letters and telephone calls of all of the complainants. The Court noted that the clients had been injured by the attorney's conduct, specifically noting that Ms. Webb had sold her home to pay the requested fee. Finally, the Court held that several aggravating factors, including the private work undertaken while the attorney was the Chief Public Defender, justified the annulment of the attorney's law license.

License to Practice Law Annulled; Restitution to be Paid.

Conflict of interest

Attorney's prior representation of co-defendant

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.)
(Writ of Prohibition Granted)

See ATTORNEYS Right to counsel of choice, (p. 70) for discussion of topic.

Prosecutor's prior representation of defendant

State ex rel. Keenan v. Hatcher, 210 W.Va. 307, 557 S.E.2d 361 (2001) (McGraw, J.)
(Reversed)

See ATTORNEYS Prosecuting attorney, Disqualification, (p. 66) for discussion of topic.

Test to determine

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.)
(Writ of Prohibition Granted)

See ATTORNEYS Right to counsel of choice, (p. 70) for discussion of topic.

ATTORNEYS

Discipline

Aggravating factors

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.) (Suspension of Law License for Three Years)

See ATTORNEYS Discipline, Mitigating factors, (p. 59) for discussion of topic.

Alteration of court order

Lawyer Disciplinary Board v. Ansell, 210 W.Va. 139, 556 S.E.2d 106 (2001) (Per Curiam) (Sixty (60) Day Suspension, with Legal Education in Ethics Required and Costs)

A complaint was filed against the attorney alleging improper alteration of certified copies of court orders. The attorney had inadvertently filed a duplicate voucher for payment on a court-appointed criminal case. The attorney realized the error and retrieved the original voucher and two (2) certified copies of the order approving payment. Subsequently, the attorney altered the names, case numbers and amounts on the orders and submitted the orders, along with the appropriate vouchers, for payment on two other cases.

Syl. pt. 1 - "A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syllabus Point 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 2 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.E.2d 783 (1985).

Syl. pt. 3 - "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

ATTORNEYS

Discipline (continued)

Alteration of court order (continued)

Lawyer Disciplinary Board v. Ansell (continued)

In concurring with the recommendations of the Lawyer Disciplinary Board, the Court noted that the alteration of a court order was a “serious offense”, but noted the attorney’s otherwise unblemished record and the fact that the attorney had not sought financial gain by double payment or overpayment.

Amount of fees

Lawyer Disciplinary Board v. Morton, 212 W.Va. 165, 569 S.E.2d 412 (2002) (Per Curiam) (Charge Dismissed)

See ATTORNEYS Amount of fees, (p. 50) for discussion of topic.

Contingency fee

Lawyer Disciplinary Board v. Morton, 212 W.Va. 165, 569 S.E.2d 412 (2002) (Per Curiam) (Charge Dismissed)

See ATTORNEYS Amount of fees, (p. 50) for discussion of topic.

Failure to file action

Office of Lawyer Disciplinary Counsel v. Nichols, 212 W.Va. 318, 570 S.E.2d 577 (2002) (Per Curiam) (Temporary Suspension of Law License)

See ATTORNEYS Suspension of law license, (p. 73) for discussion of topic.

Failure to respond to complaints

Lawyer Disciplinary Board v. Lusk, 212 W.Va. 456, 574 S.E.2d 788 (2002) (Per Curiam) (License to Practice Law Annulled)

See ATTORNEYS Annulment of law license, (p. 51) for discussion of topic.

ATTORNEYS

Discipline (continued)

Failure to report fees

Lawyer Disciplinary Board v. Ford, 211 W.Va. 228, 564 S.E.2d 438 (2002) (Per Curiam) (Admonishment Issued)

In this attorney disciplinary proceeding, the Court determined that the respondent attorney had engaged in conduct involving “dishonesty, fraud, deceit or misrepresentation”, in violation of Rule 8.4 of the Rules of Professional Conduct, and admonished the attorney.

Specifically, the attorney had been a partner in a private law firm with his father and another attorney. On a number of occasions, the attorney had accepted as fees substantial sums of money. The attorney failed, however, to report these fees to his partners and retained these sums. Upon discovery, the attorney fully admitted his actions and cooperated with an internal audit and investigation, and eventually self-reported his actions to the Office of Disciplinary Counsel.

The Court, after finding the attorney in violation of Rule 8.4, considered the appropriate sanction to be imposed. The Court, in electing to admonish the attorney instead of adopting the 45-day suspension recommended by the Lawyer Disciplinary Board, found a number of mitigating factors. Specifically, the Court noted the attorney’s alcohol problem, for which he had sought and received treatment; his cooperation with both the internal investigation and the Office of Disciplinary Counsel; his lack of any prior disciplinary history; and the “substantial harm” that would result to the attorney’s law firm if he were to be suspended.

Syl. - “Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: ‘In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of any aggravating or mitigating factors.’” Syllabus Point 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998).

ATTORNEYS

Discipline (continued)

Financial loan from client

Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 566 S.E.2d 245 (2002) (Per Curiam) (Six Month Suspension with Conditions; Subsequently Modified to Sixty-day Suspension)

In this case, the attorney represented a client in a divorce and provided representation in other matters related to the clients business. At a meeting prior to the final divorce hearing, the attorney requested that the client provide him with a loan of \$100,000. The client complied with this request and provided the funds to the attorney, who in turn provided the client with a 30-day promissory note. The money was not repaid, and the attorney subsequently indicated to the client that he intended to “offset” legal fees owed to him by the client from the amounts owed.

The client filed an ethics complaint against the attorney. The attorney failed to promptly respond to the inquiries of the disciplinary board. Formal charges were subsequently filed against the attorney, culminating in a hearing on March 20, 2001. After the hearing, the Board recommended a six-month suspension with various other conditions.

The Court adopted the majority of the Board’s recommendations. After brushing aside the attorney’s assertion that the statute of limitations had expired on the complaint, the Court addressed the specific violations alleged by the Board.

Specifically, the Court stated that (1) the attorney had violated Rules 1.8(a)(2) and (3) of the Rules of Professional Conduct by not providing the client a reasonable opportunity to seek advice on the loan from legal counsel, and by not having the client consent to the loan arrangement in writing; (2) the attorney had violated Rule 1.8(a)(1) of the Rules by entering into a loan arrangement that was not fair and reasonable to the client; and (3) the attorney violated Rule 8.1(b) by failing to promptly respond to the disciplinary proceeding inquiries.

Syl. pt. 1 - “Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, effective July 1, 1994, requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence.” Syllabus Point 1, in part, *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

Syl. pt. 4 - “A lawyer who engages in a loan transaction with his or her client must, at a minimum, assure that the arrangement satisfies West Virginia Rule of Professional Conduct 8.1(a)(1) to (3).” Syllabus Point 6, *Office of Disciplinary Counsel v. Battistelli*, 193 W.Va. 629, 457 S.E.2d 652 (1995).

ATTORNEYS

Discipline (continued)

Financial loan from client (continued)

Lawyer Disciplinary Board v. Barber (continued)

Syl. pt. 5 - "An attorney violates West Virginia Rule of Professional Conduct 8.1(b) by failing to respond to requests of the West Virginia State Bar concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint." Syllabus Point 1, *Committee on Legal Ethics of the West Virginia State Bar v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992).

Syl. pt. 6 - "Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: "In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors." Syl. Pt. 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998)." Syllabus Point 4, *Lawyer Disciplinary Board v. Battistelli*, 206 W.Va. 197, 523 S.E.2d 257 (1999).

The Court ordered that the attorney be suspended from the practice of law for a period of six months, with the condition that he make restitution to the client.

[Note: on the date of the filing of the initial opinion in this case, the attorney made full restitution to the client, and also paid the Board for the costs of the proceeding. Based upon these actions, this opinion was subsequently modified on June 7, 2002. The modified opinion reflected the Court's reduction of the attorney's suspension to a sixty-day suspension, with automatic reinstatement at the end of such period and a refund to the attorney of the costs of the proceeding.]

Holding public office as aggravating factor in proceedings

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.)
(Suspension of Law License for Three Years)

See ATTORNEYS Discipline, Mitigating factors, (p. 59) for discussion of topic.

ATTORNEYS

Discipline (continued)

Misrepresentation to clients

Office of Lawyer Disciplinary Counsel v. Nichols, 212 W.Va. 318, 570 S.E.2d 577 (2002) (Per Curiam) (Temporary Suspension of Law License)

See ATTORNEYS Suspension of law license, (p. 73) for discussion of topic.

Mitigating factors

Lawyer Disciplinary Board v. Ansell, 210 W.Va. 139, 556 S.E.2d 106 (2001) (Per Curiam) (Sixty (60) Day Suspension, with Legal Education in Ethics Required and Costs)

See ATTORNEYS Discipline, Alteration of court order, (p. 54) for discussion of topic.

Lawyer Disciplinary Board v. Ford, 211 W.Va. 228, 564 S.E.2d 438 (2002) (Per Curiam) (Admonishment Issued)

See ATTORNEYS Discipline, Failure to report fees, (p. 56) for discussion of topic.

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.) (Suspension of Law License for Three Years)

The Hearing Panel Subcommittee of the Lawyer Disciplinary Board determined that the respondent, the prosecuting attorney of Harrison County, had committed twenty-two violations of the Rules of Professional Conduct. The Board determined that the violations had occurred both before and after he was sworn in as prosecuting attorney. The violations primarily involved an extensive series of misrepresentations by the respondents to several clients, but also included various actions taken by the respondent as a prosecutor after his law license was suspended for failure to pay annual bar dues.

The respondent did not contest the Board's findings. However, he objected to the Board's recommendation for annulment of his law license. Instead, the respondent suggested that his license be suspended for a period of ninety days.

Syllabus Point 1 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus point 3, *Committee on Legal Ethics of the West Virginia State Bar v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

ATTORNEYS

Discipline (continued)

Mitigating factors (continued)

Lawyer Disciplinary Board v. Scott (continued)

The Court thus considered the appropriate sanction to be imposed upon the respondent. The respondent contended that a number of mitigating factors permitted the imposition of a penalty less severe than annulment. The Office of Disciplinary Counsel (ODC) took the position that other aggravating factors outweighed the mitigating factors cited by the respondent. In considering these alternatives, the Court formally adopted the mitigating factors proposed by the American Bar Association as standards for imposing sanctions on attorneys.

Syllabus Point 2 - Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

Syllabus Point 3 - Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses. The Court found the existence of several mitigating factors, including (1) the respondent's full and free disclosures to the disciplinary board and his cooperative attitude toward the proceedings; (2) the respondent's personal and emotional problems, to the extent that the respondent's diagnosed Bipolar II disorder may have effected his lack of diligence in several civil matters; (3) the respondent's inexperience in the practice of law; (4) the imposition of other sanctions, i.e., the respondent's voluntary resignation as the Harrison County prosecutor; and (5) the respondent's demonstrated remorsefulness, in regard to the respondent's voluntary stipulations to each of the violations. The ODC cited two incidents involving dishonesty by the respondent which occurred after the filing of the charges herein as aggravating factors. In addition, the Court also found as aggravating factors that the respondent had demonstrated a pattern of misconduct, and that the respondent had violated the Rules of Professional Conduct while holding public office.

Syllabus Point 4 - Aggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

ATTORNEYS

Discipline (continued)

Mitigating factors (continued)

Lawyer Disciplinary Board v. Scott (continued)

In balancing the aggravating and mitigating factors, the Court concluded that while annulment was too severe a sanction, that a penalty more onerous than a ninety-day suspension was required. The Court determined that a three-year suspension, with several other requirements for reinstatement, was an appropriate sanction for the respondent's actions. (As support for this sanction, the Court cited several previous cases involving attorneys who were public officials at the time of their misconduct.)

Three Year Suspension of Law License with conditions for reinstatement.

Prompt response to disciplinary inquiries

Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 566 S.E.2d 245 (2002) (Per Curiam) (Six Month Suspension with Conditions; Subsequently Modified to Sixty-day Suspension)

See ATTORNEYS Discipline, Financial loan from client, (p. 57) for discussion of topic.

Sanctions

Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 566 S.E.2d 245 (2002) (Per Curiam) (Six Month Suspension with Conditions; Subsequently Modified to Sixty-day Suspension)

See ATTORNEYS Discipline, Financial loan from client, (p. 57) for discussion of topic.

Lawyer Disciplinary Board v. Lusk, 212 W.Va. 456, 574 S.E.2d 788 (2002) (Per Curiam) (License to Practice Law Annulled)

See ATTORNEYS Annulment of law license, (p. 51) for discussion of topic.

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.) (Suspension of Law License for Three Years)

See ATTORNEYS Discipline, Mitigating factors, (p. 59) for discussion of topic.

ATTORNEYS

Discipline (continued)

Sanctions (continued)

Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (Per Curiam)
(Public Reprimand and Costs)

See ATTORNEYS Reprimand, (p. 68) for discussion of topic.

Standards for sanctions

Lawyer Disciplinary Board v. Ford, 211 W.Va. 228, 564 S.E.2d 438 (2002) (Per Curiam)
(Admonishment Issued)

See ATTORNEYS Discipline, Failure to report fees, (p. 56) for discussion of topic.

Lawyer Disciplinary Board v. Lusk, 212 W.Va. 456, 574 S.E.2d 788 (2002) (Per Curiam)
(License to Practice Law Annulled)

See ATTORNEYS Annulment of law license, (p. 51) for discussion of topic.

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.)
(Suspension of Law License for Three Years)

See ATTORNEYS Discipline, Mitigating factors, (p. 59) for discussion of topic.

Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (Per Curiam)
(Public Reprimand and Costs)

See ATTORNEYS Reprimand, (p. 68) for discussion of topic.

Suspension of law license

Office of Lawyer Disciplinary Counsel v. Nichols, 212 W.Va. 318, 570 S.E.2d 577 (2002)
(Per Curiam) (Temporary Suspension of Law License)

See ATTORNEYS Suspension of law license, (p. 73) for discussion of topic.

ATTORNEYS

Discipline (continued)

Suspension with conditions for reinstatement

Lawyer Disciplinary Board v. Ansell, 210 W.Va. 139, 556 S.E.2d 106 (2001) (Per Curiam)
(Sixty (60) Day Suspension, with Legal Education in Ethics Required and Costs)

See ATTORNEYS Discipline, Alteration of court order, (p. 54) for discussion of topic.

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.)
(Suspension of Law License for Three Years)

See ATTORNEYS Discipline, Mitigating factors, (p. 59) for discussion of topic.

Violations by public officeholder

Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (Per Curiam)
(Public Reprimand and Costs)

See ATTORNEYS Reprimand, (p. 68) for discussion of topic.

Disqualification

Attorney's prior representation of co-defendant

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.)
(Writ of Prohibition Granted)

See ATTORNEYS Right to counsel of choice, (p. 70) for discussion of topic.

Conflict of interest

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.)
(Writ of Prohibition Granted)

See ATTORNEYS Right to counsel of choice, (p. 70) for discussion of topic.

Prosecuting attorney

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam)
(Reversed and Remanded)

See DISCOVERY Failure to provide, (p. 113) for discussion of topic.

ATTORNEYS

Disqualification (continued)

Standards

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.) (Writ of Prohibition Granted)

See ATTORNEYS Right to counsel of choice, (p. 70) for discussion of topic.

Ineffective assistance of counsel

State v. Chapman, 210 W.Va. 292, 557 S.E.2d 346 (2001) (Per Curiam) (Affirmed)

See COMPETENCY Evaluation prior to trial, (p. 84) for discussion of topic.

Generally

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

In this appeal, the appellant sought review of the circuit court's denial of his petition for a writ of habeas corpus. The appellant had been convicted of three counts of first degree sexual assault and one count of third degree sexual assault.

The appellant assigned two primary errors as grounds for his writ: (1) ineffective assistance of counsel, and (2) the improper transfer of his case from a disqualified judge to another judge within the same circuit. The circuit court found no merit in these contentions and denied the petition.

Syllabus Point 2 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syllabus Point 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syllabus Point 3 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syllabus Point 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

ATTORNEYS

Ineffective assistance of counsel (continued)

Generally (continued)

State ex rel. Myers v. Painter (continued)

Syllabus Point 4 - "The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation." Syllabus Point 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

Syllabus Point 5 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syllabus Point 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court first examined the appellant's argument regarding ineffective assistance of counsel. The Court noted a number of "acts and omissions" by appellant's trial counsel, including (1) counsel's failure to obtain a copy of a psychological profile of the alleged victim; (2) counsel's acquiescence to a continuance of a trial date without the approval of his client, and additional failure to assure the appellant's presence at the hearing where the trial was continued and to make a record of such hearing; (3) counsel's failure to permit the appellant to be present at, and to make a record of, a bench conference wherein a discussion was had regarding a juror; and (4) counsel's failure to insure the presence of the appellant at a hearing/meeting where the judge discussed the issue of his disqualification.

Applying the standards of *Strickland*, supra, and *Miller*, supra, the Court held that these errors, taken cumulatively, amounted to deficient performance and ineffective assistance of counsel.

The Court also held that the trial court's procedure in transferring the appellant's case was likewise defective. The trial judge had concluded, during an in-camera, off-the-record discussion, that due to a relationship with the victim's family he was disqualified from presiding in the case. The trial judge then entered an order appointing another judge within the circuit. The Court noted that this procedure was inappropriate under the Trial Court Rules, and that once the trial judge had decided to recuse himself, he had no additional authority over the case.

Syllabus Point 6 - "The failure to follow the procedures contained in the administrative rule relating to the temporary assignment of a circuit judge to a case, where the existing circuit judge is disqualified, will render the appointment of such temporary judge void, and a writ of prohibition will lie to prevent his exercising jurisdiction over the case." Syllabus Point 3, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977).

ATTORNEYS

Ineffective assistance of counsel (continued)

Generally (continued)

State ex rel. Myers v. Painter (continued)

Based upon the ineffective assistance of counsel the appellant received at trial, and the improper procedure followed by the trial court regarding judicial disqualification, the Court concluded that the appellant had been denied a fair trial.

Reversed and remanded.

Standards for determining

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally (p. 64) for discussion of topic.

Prosecuting attorney

Disqualification

State ex rel. Keenan v. Hatcher, 210 W.Va. 307, 557 S.E.2d 361 (2001) (McGraw, J.) (Reversed)

The defendant was indicted for murder. Several years prior to the indictment, the defendant had been represented by the prosecuting attorney who prepared and signed the murder indictment, and by one of his assistant prosecutors on separate felony matters. A motion by the defendant to recuse the prosecuting attorney's office was denied by the trial court. Following the defendant's conviction for voluntary manslaughter, the prosecutor filed a recidivist information charging the defendant as a habitual offender. The information alleged several prior felony convictions, including each of the charges where the defendant was represented by the prosecutor and his assistant.

The Court determined that the prosecutor's office was disqualified from representing the state in the recidivist proceeding where the prosecutor and his assistant had acted as defense counsel for the prior offenses which were the basis for the information. The Court also declared that the information, which the prosecutor had prepared and filed, was invalid and could not serve as a basis for further prosecution.

ATTORNEYS

Prosecuting attorney (continued)

Disqualification (continued)

State ex rel. Keenan v. Hatcher (continued)

Syl. pt. 1 - Under West Virginia Rule of Professional Responsibility 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Syl. pt. 2 - A prosecutor is disqualified from representing the state in a recidivist proceeding conducted pursuant to *W.Va. Code* §§ 61-11-18 & -19, where such lawyer acted as defense counsel in connection with the prior felony convictions that are the basis for such proceeding.

Syl. pt. 3 - Where a recidivist proceeding has previously been initiated against a criminal defendant by an information filed pursuant to *W.Va. Code* §§ 61-11-18 & -19, and it is later determined that the prosecuting attorney who initiated the charge was disqualified from acting in the case at the time such instrument was filed, the recidivist information is invalid and may not serve as a basis for further proceedings.

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Failing to disclose exculpatory evidence

State v. Kearns, 210 W.Va. 167, 556 S.E.2d 812 (2001) (Per Curiam) (Reversed and Remanded for New Trial)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 112) for discussion of topic.

Improper closing argument

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

ATTORNEYS

Prosecuting attorney (continued)

Improper closing argument (continued)

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Improper comments to jury

State v. Adkins, 209 W.Va. 212, 544 S.E.2d 914 (2001) (Per Curiam) (Affirmed)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 282) for discussion of topic.

Improper statements during sentencing

Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002) (Per Curiam) (Affirmed)

See HABEAS CORPUS Plea agreement, Violation of, (p. 180) for discussion of topic.

Removal from office

Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (Per Curiam) (Public Reprimand and Costs)

See ATTORNEYS Reprimand, (p. 68) for discussion of topic.

Reprimand

Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (Per Curiam) (Public Reprimand and Costs)

In the case of *In Re Sims*, 206 W.Va. 213, 523 S.E.2d 273 (1999) (*Sims I*), the Court ordered the removal from office of John Sims as the prosecuting attorney of Logan County. Several citizens and elected officials in Logan County had sought Sims' removal from office for a variety of alleged offenses, including official misconduct, malfeasance and misconduct. A three-judge panel appointed by the Court to hear the matter determined that Sims should be suspended from the practice of law. The Court disagreed and, citing the provisions of West Virginia Code § 6-6-7 (1985), ordered Sims' removal from office.

ATTORNEYS

Reprimand (continued)

Lawyer Disciplinary Board v. Sims (continued)

Following Sims' removal from office, attorney disciplinary proceedings were initiated. The Hearing Panel concluded that Sims' law license should be suspended, based upon the Panel's conclusion that Sims had violated West Virginia Rules of Professional Conduct 3.6, 3.8, and 8.4 prior to and following the admonition of the circuit court to refrain from improper behavior. The "improper behavior" cited by the Court involved a number of extrajudicial statements made by Sims to various news agencies regarding matters pending before the grand jury.

Syllabus Point 2 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

Syllabus Point 3 - "Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office." Syllabus Point 3, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syllabus Point 5 - "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

The Court agreed that there were both aggravating and mitigating factors to be considered in determining the appropriate sanction to be imposed. The Court noted Sims' "deliberate practice and pattern of repeatedly making extrajudicial statements which had a substantial likelihood of materially prejudicing adjudicative proceedings" as an aggravating factor. However, the Court noted that Sims' removal from office was an "effective, dramatic and powerful punishment", and constituted a significant mitigating factor.

The Court concluded that under the circumstances of the case, and in light of Sims' removal from office, additional sanctions beyond a public reprimand and a requirement that he pay the costs of the proceeding were not warranted.

Public Reprimand and Costs.

ATTORNEYS

Right to counsel of choice

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.) (Writ of Prohibition Granted) August 21, 2003

Two individuals, Mr. Youngblood (the petitioner herein) and Mr. Fleece, were charged with first-degree murder in February 2001. Mr. Youngblood subsequently hired Robert C. Stone as his counsel on June 24, 2002.

On September 6, 2001, nine months prior to being retained by the petitioner, a paralegal in Mr. Stone's office held a brief meeting with the wife of the petitioner's co-defendant to explore the possibility of Mr. Stone's representation of Mr. Fleece. Due to financial reasons, Mr. Stone did not assume representation of Mr. Fleece.

On June 26, 2002, Mr. Fleece entered into a plea agreement with the State wherein he would plead guilty to a reduced charge of voluntary manslaughter and would testify against the petitioner. The State then filed a motion to disqualify Mr. Stone from acting as counsel for the petitioner, citing that Mr. Stone's office had been provided "personal and confidential facts" regarding Mr. Fleece during the September 6, 2001 meeting.

The circuit court conducted two hearings on the State's motion to disqualify Mr. Stone. During the course of these hearings, the court examined a sealed two-page memorandum prepared by Mr. Stone's paralegal. The memorandum summarized the contents of the paralegal's September 6 meeting with Mr. Fleece's wife. The court concluded that the memorandum indicated that 'considerable material information' regarding the homicide was conveyed to the paralegal. The court determined that a conflict of interest existed between Mr. Stone's duty to zealously represent the petitioner and his duty to protect the confidentiality of the statements made by Mrs. Fleece to the paralegal, and granted the State's motion for disqualification.

The petitioner asserted that the trial court erred in determining that confidential communications had been disclosed requiring disqualification, thus depriving him of his Sixth Amendment right to counsel of his choice, and sought a writ of prohibition to prevent enforcement of the order disqualifying Mr. Stone.

Syllabus Point 2 - Where an attorney has received confidential information from a prospective client, the attorney may be disqualified from representing another individual on grounds of actual or presumed conflict despite the absence of an actual attorney-client relationship.

Syllabus Point 3 - Before disqualification of counsel can be ordered on grounds of conflict arising from confidences presumably disclosed in the course of discussions regarding a prospective attorney-client relationship, the court must satisfy itself from a review of the available evidence, including affidavits and testimony of affected individuals, that confidential information was in fact discussed.

ATTORNEYS

Right to counsel of choice (continued)

State ex rel. Youngblood v. Sanders (continued)

The Court initially observed that the petitioner's right to retain counsel and be represented by that counsel is a right of "constitutional dimension", but that trial courts have a duty to determine that no conflict of interest exists in regard to such representation.

Citing *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, ("Ogden II"), 211 W.Va. 423, 566 S.E.2d 566 (2002), the Court noted that the critical factor in determining whether alleged confidential disclosures require disqualification is whether "there is a substantial risk that representation of the present client will involve the use of [confidential] information acquired in the course of representing the former client, *unless that information has become generally known.*" [emphasis in original].

Thus, the Court noted, when the confidential information at issue has been disclosed to other individuals, a conflict requiring disqualification cannot arise based on such "generally known" information.

Syllabus Point 4 - When the information that is the subject of a disqualification motion predicated on prospective representation was "generally known" or otherwise disclosed to individuals other than prospective counsel, the information cannot serve as a basis for disqualification under Rule 1.9 of the Rules of Professional Conduct.

The Court observed that "the objective of the court's inquiry in this case was to determine whether any confidential communications were shared by Mrs. Fleece" with the paralegal. After reviewing the memorandum in question, the Court determined that there were no confidential communications made in the course of the meeting. The Court noted that the meeting was essentially a "generalized discussion" which might occur in the course of any client consultation (i.e., the type of case, preparation of written factual accounts of the event, and the need to obtain character witnesses). The Court noted that the remainder of the information related by Mrs. Fleece to the paralegal was contained in several police reports and was "generally known", thus clearly qualifying as an exception to the disqualification rule.

Syllabus Point 5 - When disqualification of counsel is raised in the criminal context, the issue must be resolved with careful concern for the defendant's right to assistance of counsel guaranteed under our federal and state constitutions.

Syllabus Point 6 - When presented with a disqualification motion involving communications between an individual and prospective counsel, trial courts must carefully examine all relevant evidence that bears on the pivotal issue of whether confidential information has been disclosed which would impinge upon the attorney's right to zealously represent the current client or his duty to protect the confidences of the prospective client.

ATTORNEYS

Right to counsel of choice (continued)

State ex rel. Youngblood v. Sanders (continued)

Syllabus Point 7 - Trial courts must also recognize that in the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse.

The Court noted the existence of a presumption in favor of the defendant's choice of counsel, and noted that the presumption had not been overcome by a showing of potential conflict. The Court held that "[a]bsent the necessary showing of potential conflict, we cannot deny to Petitioner his right to counsel of his choice."

Writ of Prohibition Granted.

Standby counsel

State v. Powers, 211 W.Va. 116, 563 S.E.2d 781 (2001) (Davis, J.) (Affirmed)

The defendant was tried for burglary, grand larceny, third offense shoplifting and breaking and entering. The defendant moved to represent himself *pro se* and the trial court granted this motion. The court, *sua sponte*, appointed one of the defendant's previous lawyers to act as standby counsel. During trial, the defendant apparently had a change of heart and asked the court to allow the standby lawyer to assume representation. The Court denied the motion and the defendant was subsequently convicted.

The Court determined that it was not an abuse of discretion for the trial court to decline to require the standby attorney to assume full representation of the defendant.

Syl. pt. 1 - When a criminal defendant who has asserted the right of self-representation seeks to relinquish that right and utilize substitute counsel, this Court will apply an abuse of discretion standard of review to the trial court's decision on the matter.

Syl. pt. 2 - When a circuit court appoints standby counsel to assist a criminal defendant who had been permitted to proceed *pro se*, the circuit court must, on the record at the time of the appointment, advise both counsel and the defendant of the specific duties standby counsel should be prepared to perform.

Syl. pt. 3 - When a *pro se* criminal defendant requests the trial court to permit standby counsel to assume a duty set forth by the court in connection with its appointment of standby counsel, the court, in a proper exercise of its discretion, should grant the request.

ATTORNEYS

Standby counsel (continued)

State v. Powers (continued)

Syl. pt. 4 - When a *pro se* criminal defendant asks the court to allow standby counsel to take over his or her trial defense, and the court has not previously ordered that standby counsel to be prepared to take over in the manner requested by the defendant, then in deciding whether to grant the defendant's request that trial court should consider: (1) the defendant's prior history regarding the appointment of counsel, *e.g.* the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.

Suspension of law license

Office of Lawyer Disciplinary Counsel v. Nichols, 212 W.Va. 318, 570 S.E.2d 577 (2002) (Per Curiam) (Temporary Suspension of Law License)

In October 2000, two separate ethical complaints were filed against the respondent attorney. Each of the complaints alleged, *inter alia*, that the respondent had failed to file lawsuits on behalf of two separate clients, and that when questioned about the cases, the respondent had intentionally misrepresented the status of the cases to the clients.

The Office of Lawyer Disciplinary Counsel (OLDC) also noted that, after the investigations of the initial complaints had been undertaken, four other ethical complaints were filed against the respondent. The subsequent complaints were similar in nature to the initial complaints. Based on the later complaints, the OLDC filed a petition with the Court to suspend the law license of the respondent pending final resolution of the original complaints.

The Court noted that under Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure, a lawyer's license may be temporarily suspended if the Court determines that there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct, and (2) poses a substantial threat of irreparable harm to the public until an underlying disciplinary proceeding has been resolved.

The Court determined that there was "sufficient credible and unrefuted evidence" to demonstrate that the respondent had violated numerous provisions of the Rules of Professional Conduct. The Court observed that the respondents' alleged misrepresentations of the status of the complainant's cases, in addition to the respondent's alleged failure to promptly and expeditiously pursue the legal claims therein, clearly constituted an "initial demonstration" of violations of the Rules of Professional Conduct.

ATTORNEYS

Suspension of law license (continued)

Office of Lawyer Disciplinary Counsel v. Nichols (continued)

The Court also noted that the continuing allegations of improper activity by the respondent following the filing of the initial complaints demonstrated a “pattern of misrepresentation”, and established that the respondent posed a substantial threat of irreparable harm to the public.

Syllabus Point 1 - “If the Court, after proceeding in accordance with West Virginia Rule of Lawyer Disciplinary Procedure 3.27(c), concludes that the respondent lawyer should be temporarily suspended, it will so order.” Syllabus point 3, in part, *Office of Disciplinary Counsel v. Battistelli*, 193 W.Va. 629, 457 S.E.2d 652 (1995).

Syllabus Point 2 - “[T]he Supreme Court of Appeals may suspend the license of a lawyer . . . when there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct . . . and (2) poses a substantial threat of irreparable harm to the public until the underlying disciplinary proceeding has been resolved.” Syllabus point 2, in part, *Committee on Legal Ethics of West Virginia State Bar v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993).

Temporary Suspension of Law License.

BAIL

Bailpiece as notice of request for disposition

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

See AGREEMENT ON DETAINERS Time limits, (p. 27) for discussion of topic.

BIFURCATION

Mandatory bifurcation of prior offenses

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.)
(Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

BRANDISHING

Lesser included offense of wanton endangerment

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

CHARGING DOCUMENT

Citation in lieu of arrest

Defects in citation voiding prosecution

State v. Gaskins, 210 W.Va. 580, 558 S.E.2d 579 (2001) (Albright, J.) (Conviction Vacated and Remanded)

The defendant was issued a citation on January 15, 1998 for possession of more than fifteen grams of marijuana. The citation did not include a date by which the defendant was to report to magistrate court. Over two years later, and following the suspension of the defendant's drivers license, the defendant went to the Harrison County Magistrate Court and entered a *pro se* plea of guilty to possession of less than fifteen grams of marijuana. The defendant was placed on probation; however, the state later moved to revoke his probation. At the probation revocation hearing, counsel moved to dismiss all matters because the state had failed to initiate the prosecution within one (1) year of the date of the offense. This request was denied and the defendant was given a suspended jail sentence and fined; the jail sentence was suspended and the defendant was placed on one (1) year probation.

Syl. pt. 1 - "Lack of jurisdiction may be raised for the first time in this court, when it appears on the face of the bill and proceedings, and it may be taken notice of by this court on its own motion." Syl. Pt. 3, *Charleston Apartments Corp. v. Appalachian Elec. Power Co.*, 118 W.Va. 694, 192 S.E. 294 (1937).

Syl. pt. 2 - A citation that fails to contain a time within which the subject of the citation must appear as required by West Virginia Code § 62-1-5a (1982) (Repl. Vol. 2000) and the due process principles embodied therein, renders the citation void *ab initio*. Magistrates are required to dismiss such facially flawed citations without prejudice, pursuant to the applicable provisions of West Virginia Code § 50-4-12 (1978) (Repl. Vol. 2000).

The Court held that the magistrate did not, therefore, have the power or authority to accept the defendant's plea and vacated the defendant's conviction for lack of jurisdiction.

Defects in complaint requiring dismissal

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

CHARGING DOCUMENT

Required finding of probable cause

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

CHILD SUPPORT

Obligation to pay after termination of parental rights

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

COLLATERAL ACTS OR CRIMES

Admissibility

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

COMPETENCY

Competency of victim to testify

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Duty of court to conduct competency hearing

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

The appellant was charged with sexually assaulting an underage youth. Following his preliminary hearing, the appellant was evaluated by Harold Slaughter, a licensed psychologist. Mr. Slaughter determined that the appellant was competent to stand trial and was criminally responsible for his actions; however, he questioned the appellant's ability to assist trial counsel in his defense. The appellant's counsel did not request a competency hearing.

Following his indictment, the appellant filed a motion for an independent psychological or psychiatric evaluation to determine the competency of the alleged victim to testify at trial. This motion was denied. Shortly thereafter, the appellant was convicted of first degree sexual assault. After the trial, the appellant moved for a new trial, and assigned as a reason the trial court's error in not conducting a competency hearing. The appellant also moved for a competency hearing prior to sentencing. At a hearing on the post-trial motions, the court heard testimony from three separate psychologists. The court denied the appellant's motions and imposed sentence on the appellant.

The appellant's primary assignments of error were (1) the trial court's failure to *sua sponte* conduct a pre-trial competency hearing of the appellant; (2) the trial court's failure to order a pre-sentencing competency hearing of the appellant; (3) the introduction by the state of Rule 404(b) evidence indicating that the appellant had previously sexually assaulted the alleged victim; and (4) the trial court's failure to order a competency evaluation of the five-year old victim before permitting him to testify.

The Court denied all of the appellant's assignments of error.

First, the Court noted the findings of Mr. Slaughter, and observed that the appellant's trial counsel had expressly stated that the appellant's competency was "not going to be an issue." The Court cited *State v. Moore*, 193 W.Va. 642, 457 S.E.2d 801 (1995), in which the Court held that a trial court could rely upon the conclusions of a psychological examination and the representations of defense counsel in determining whether a competency hearing was required. The Court held that in the absence of a request for a competency hearing, and based upon the report of Mr. Slaughter, the trial court did not abuse its discretion in failing to order a competency evaluation or hearing.

COMPETENCY

Duty of court to conduct competency hearing (continued)

State v. Slaton (continued)

Similarly, the Court held that it was not an abuse of discretion for the court to deny the appellant's motion for an evaluation prior to sentencing. The Court observed that the appellant had been sent for a diagnostic evaluation under *W.Va. Code*, § 62-12-7a (1994), and that the evaluating psychologist from Huttonsville testified at the sentencing hearing, along with two other psychologists who examined the appellant.

Syl. pt. 1 - "It is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent." *State v. Cheshire*, 170 W.Va. 217, 219, 292 S.E.2d 628, 630 (1982)." Syllabus Point 5, *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991).

Syl. pt. 2 - "No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his attorney and to assist in the preparation of his defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him." Syllabus Point 1, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976)." Syllabus Point 6, *State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987).

Syl. pt. 3 - "When a trial judge is made aware of a possible problem with defendant's competency, it is abuse of discretion to deny a motion for psychiatric evaluation." Syllabus Point 4, in part, *State v. Demastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

Regarding the purported Rule 404(b) violation, the Court held that the evidence adduced at trial of other alleged sexual acts by the appellant against the victim did not constitute a violation of the rule. The Court held that this evidence was "intrinsic" to the indicted charge, *i.e.*, a part and parcel of the proof of the charge in the indictment. The Court determined that the multiple incidents of sexual assault were "inextricably intertwined" and were part of a single criminal episode.

Syl. pt. 4 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus point 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983)." Syllabus Point 1, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999).

Finally, the Court held that it was not error for the trial court to refuse to order an evaluation of the victim. The Court cited the standards set forth in *State v. Delaney*, 187 W.Va. 212, 417 S.E.2d 903 (1992), and determined that the appellant had not presented any evidence to the trial court establishing a compelling need or reason for such an examination.

COMPETENCY

Duty of court to conduct competency hearing (continued)

State v. Slaton (continued)

Syl. pt. 5 - "In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use." Syllabus Point 3, *State v. Delaney*, 187 W.Va. 212, 417 S.E.2d 903 (1992).

Duty of court to evaluate

State v. Chapman, 210 W.Va. 292, 557 S.E.2d 346 (2001) (Per Curiam) (Affirmed)

See COMPETENCY Evaluation prior to trial, (p. 84) for discussion of topic.

State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001) (Per Curiam) (Vacated and Remanded)

See COMPETENCY Evaluation prior to trial, (p. 85) for discussion of topic.

Evaluation prior to trial

State v. Chapman, 210 W.Va. 292, 557 S.E.2d 346 (2001) (Per Curiam) (Affirmed)

Following the defendant's arrest for malicious wounding, the defendant's trial counsel moved for a psychiatric evaluation of the defendant to determine the defendant's competency to stand trial. The defendant was examined by a psychologist and a psychiatrist, each of whom found the defendant competent to stand trial. Shortly thereafter, while completing a plea form, defense counsel indicated that he did not believe the defendant to be competent to stand trial. However, at the plea hearing, counsel indicated that this opinion had changed, and that counsel now believed the defendant to be competent to enter his plea.

The Court affirmed the defendant's convictions resulting from his guilty pleas to two counts of malicious wounding. The defendant's primary assertion on appeal was that the trial court had failed to establish his competency before accepting his plea. The defendant also asserted ineffective assistance of counsel.

COMPETENCY

Evaluation prior to trial (continued)

State v. Chapman (continued)

The Court noted, in essence, that there was no evidence of irrational behavior by the defendant other than the crimes committed by the defendant. The Court noted no prior history of behavioral abnormalities or previous confinement for mental disturbances, and noted that the only medical evidence produced in the case indicated that the defendant was competent. For many of these same reasons, the Court found that counsel's performance could not be attacked as ineffective.

Syl. pt. 6 - "There is no due process right to a competency hearing where psychological evidence performed prior to trial revealed that the appellant was aware of his legal rights and able to participate in his defense." Syllabus Point 5, *State v. Garrett*, 182 W.Va. 166, 386 S.E.2d 823 (1989).

Syl. pt. 7 - "Evidence of irrational behavior, a history of mental illness or behavioral abnormalities, previous confinement for mental disturbance, demeanor before the trial judge, psychiatric and lay testimony bearing on the issue of competency, and documented proof of mental disturbance are all factors which a trial judge may consider in the proper exercise of his discretion." Syllabus Point 5, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975), overruled on other grounds by *State v. Demastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

Syl. pt. 10 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syllabus Point 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001) (Per Curiam) (Vacated and Remanded)

The defendant was convicted of robbery by the use of a firearm and was sentenced to a forty-year term of imprisonment. The Court vacated the judgment and remanded the case to circuit court for the purposes of conducting a retrospective competency hearing.

Prior to trial, the defendant had been examined on a number of occasions for the purposes of determining his competency to stand trial. Although eventually found competent, during his trial the defendant exhibited several instances of irrational behavior and actions. Counsel for the defendant requested a mistrial due to his client's continuing psychosis, which motion was denied the circuit court.

COMPETENCY

Evaluation prior to trial (continued)

State v. Sanders (continued)

In vacating judgment, the Court noted that the circuit court has a continuing duty to determine the competency of a defendant, and if it appears to the trial court that a defendant's mental state has deteriorated, the trial court must conduct further inquiry.

Syl. pt. 1 - "It is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent." *State v. Cheshire*, 170 W.Va. 217, 219, 292 S.E.2d 628, 630 (1982)." Syl. Pt. 5, *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991).

Syl. pt. 3 - "Evidence of irrational behavior, a history of mental illness or behavioral abnormalities, previous confinement for mental disturbance, demeanor before the trial judge, psychiatric and lay testimony bearing on the issue of competency, and documented proof of mental disturbance are all factors which a trial judge may consider in the proper exercise of his [or her] discretion [to order an inquiry into the mental competence of a criminal defendant]." Syl. Pt. 5, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975).

Syl. pt. 4 - Where a criminal defendant has already been afforded a competency hearing pursuant to *W.Va. Code* §§ 27-6A-1(d) & -2 (1983) and been found mentally competent to stand trial, a trial court need not suspend proceedings for purposes of permitting further psychiatric evaluation or conducting an additional hearing unless it is presented with new evidence casting serious doubt on the validity of the earlier competency finding, or with an intervening change of circumstance that renders the prior determination an unreliable gauge of present mental competency.

The Court also addressed the issue of the trial judge's involvement in the plea process. During plea discussions at a competency hearing, the trial court indicated to the defendant that if he pleaded guilty, he would receive a sentence of thirty years. The Court found a clear violation of Rule 11(e)(1) and ordered that, upon remand, the case be assigned to another judge. The Court further stated that if the retrospective competency hearing indicated that the defendant was competent at the time of his original trial, that the court should sentence the defendant to no more than thirty years imprisonment.

Pre-sentencing competency hearing

State v. Kent, ___ W.Va. ___, ___ S.E.2d ___ (No. 30649, May 23, 2003) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Standards to determine competency to stand trial, (p. 88) for discussion of topic.

COMPETENCY

Pre-sentencing competency hearing (continued)

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Procedures to determine

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was charged with the 1991 murders of his brother and sister-in-law. Following his arrest, he was deemed incompetent to stand trial and was committed to a state mental hospital. In March of 1993 he was found competent to stand trial, but the trial was delayed because the appellant suffered an injury while incarcerated.

In August of 1995, a psychiatrist for the State again found the appellant competent to stand trial. The appellant sought and was granted an independent competency evaluation. The psychiatrist and psychologist who examined the appellant submitted reports on October 16, 1995 indicating that the appellant was not competent to stand trial. The Court conducted a competency hearing on October 24, 1995. The appellant's psychiatrist was unable to attend the hearing, and was also unable to attend the appellant's subsequent trial. The trial court refused to continue both the hearing and the trial, found the appellant competent to stand trial, and ruled that the psychiatrist could testify at trial via telephone. The appellant was convicted three days later. The appellant was subsequently denied habeas corpus relief by the circuit court.

The appellant's primary assignment of error was that the trial court erred by finding him competent to stand trial.

Syl. pt. 1 - "Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong." Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975).

Syl. pt. 3 - "It is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent." *State v. Cheshire*, 170 W.Va. 217, 219, 292 S.E.2d 628, 630 (1982)." Syllabus Point 5, *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991).

The Court noted its displeasure with the procedures used by the trial court in finding the appellant competent to stand trial. The Court held that the trial court's actions in refusing to grant a continuance of both the competency hearing and the trial constituted a "deficient" procedure, because under the circumstances of the case it was critical for the psychiatrist to be present at the competency hearing to fully explain the basis of his determination of incompetency.

COMPETENCY

Procedures to determine (continued)

Morris v. Painter (continued)

The Court observed that the “preponderating” evidence clearly demonstrated the appellant’s incompetency at the time of trial. (This evidence included, *inter alia*, the notable fact that the appellant and not spoken to anyone, including his attorneys, since his arrest in 1991.)

Reexamination of competency after trial

State v. Kent, ___ W.Va. ___, ___ S.E.2d ___ (No. 30649, May 23, 2003) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Standards to determine competency to stand trial, (p. 88) for discussion of topic.

Standards to determine competency to stand trial

State v. Kent, ___ W.Va. ___, ___ S.E.2d ___ (No. 30649, May 23, 2003) (Per Curiam) (Reversed and Remanded)

On July 27, 1998, the appellant was charged with first degree murder. Two days after his arrest, his counsel requested psychiatric and psychological examinations for the appellant. The appellant was examined by Dr. John Justice and a team of mental health providers at Sharpe Hospital.

Dr. Justice’s finding, detailed in an October 5, 1998 report, indicated that the appellant suffered from a long history of bipolar effective disorder, and was not competent to stand trial. Based upon this finding, the circuit court found that the appellant was not competent to stand trial and committed the appellant to a course of recommended treatment at Sharpe Hospital.

In February 1999, Sharpe Hospital reported that the appellant had been restored to competency. The State requested that the appellant be further evaluated by a forensic psychologist and a forensic psychiatrist.

The appellant was returned to the Marion County Correctional Center in June 1999. The appellant’s trial began on September 27, 1999. During the trial, the appellant exhibited numerous symptoms of his mental illness, including a refusal to speak to his attorney and his refusal to take an active role in his defense.

COMPETENCY

Standards to determine competency to stand trial (continued)

State v. Kent (continued)

After his conviction, the appellant's counsel filed a number of post-trial motions, including a motion to have the appellant reexamined for his competency to stand trial. The appellant was transported back to Sharpe Hospital, where Dr. Justice discovered that the appellant had not been receiving his prescribed medications. At a subsequent hearing, the chief jail administrator at the Marion County Correctional Center testified that the appellant, upon returning to the jail after his restoration to competency, had refused to go to a local mental health provider so that his prescription could be refilled. The Correctional Center Authority did not advise the circuit court, the prosecuting attorney, or the appellant's attorney that the appellant was no longer taking his required medication.

The circuit court also heard the testimony of Dr. Justice, who testified that due to the lack of his prescribed medication, the appellant was suffering the same symptoms during his trial as he was suffering before the restoration of his competency. The State presented the testimony of Dr. Thomas Adamski, who had examined the appellant after the trial (and after he had resumed his medications), and who opined that the appellant was competent at trial.

The circuit court found that the appellant was competent to stand trial, and sentenced the appellant to life in prison without the possibility of parole.

Syllabus Point 2 - "No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his attorney and to assist in the preparation of his defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him." Syllabus Point 1, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

Syllabus Point 3 - "To be competent to stand trial, a defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him." Syllabus Point 2, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975), overruled on other grounds by *State v. Demastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

The Court reversed the conviction, holding that, "[w]ithout his medications and counseling, the appellant regressed and relapsed into the state in which the circuit court had initially found him incompetent to stand trial." The Court, in reviewing the record, found that the appellant did not "exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding", and that the appellant lacked the "rational, as well as factual, understanding of the proceedings against him."

Reversed and remanded.

COMPETENCY TO PLEAD

Generally

State v. Chapman, 210 W.Va. 292, 557 S.E.2d 346 (2001) (Per Curiam) (Affirmed)

See COMPETENCY Evaluation prior to trial, (p. 84) for discussion of topic.

COMPLAINTS

Required finding of probable cause

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

Sufficiency of

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

The defendant was charged in the Magistrate Court of Kanawha County with the misdemeanor offense of battery. The magistrate issued a summons for the defendant to appear and answer the charge, but failed to check the “probable cause found” box on the complaint. The defendant was convicted of battery and appealed the conviction to the circuit court.

The circuit court noted *sua sponte* during a hearing on the appeal that the magistrate had failed to check the relevant probable cause box on the complaint. The defendant moved for dismissal of the charge based on the omission on the complaint. The circuit court granted the motion for dismissal, finding that the magistrate’s failure to check the appropriate probable cause box was an error substantially affecting the rights of the defendant.

The State sought a writ of prohibition to prohibit the circuit court’s dismissal of the appeal.

Syllabus Point 1 - “The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court’s action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant’s right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.” Syl. Pt. 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

Syllabus Point 2 - A writ of prohibition will issue from this Court “to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate[.]” Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

COMPLAINTS

Sufficiency of (continued)

State ex rel. Clifford v. Stucky (continued)

Syllabus Point 3 - “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

The Court agreed with the argument of the State that, despite the magistrate's failure to check the appropriate probable cause box, when the complaint and the summons were viewed together, it was clear that a probable cause determination had been made by the magistrate. The Court noted, among other facts, that the first sentence of the summons indicated that the court had found probable cause to believe that the defendant had committed the misdemeanor offense of battery.

Syllabus Point 4 - The documents initiating a criminal prosecution in magistrate court, when taken as a whole, must clearly indicate that a probable cause determination has been made by a magistrate before a warrant for arrest or summons to appear was issued.

The Court held that when the complaint in the defendant's case was viewed in tandem with the summons to appear, there was a clear indication that probable cause had been found by the magistrate before the issuance of the summons.

Writ of Prohibition Granted.

CONFESSIONS

Admissibility of

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

CONFRONTATION CLAUSE

Admission of third party confession

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Evidence

Hearsay

State v. Pettrey, 209 W.Va. 449, 549 S.E.2d 323 (2001) (Maynard, J.) (Affirmed)

See EVIDENCE Admissibility, Hearsay, (p. 142) for discussion of topic.

State v. Shrewsbury, ___ W.Va. ___, 582 S.E.2d 774 (No. 30597, April 14, 2003) (Per Curiam) (Affirmed)

See CONFRONTATION CLAUSE Generally, (p. 94) for discussion of topic.

Generally

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

State v. Shrewsbury, ___ W.Va. ___, 582 S.E.2d 774 (No. 30597, April 14, 2003) (Per Curiam) (Affirmed)

In a case significantly reminiscent of *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001), the Court considered whether the testimony of “play therapists” as to specific statements made by alleged victims of child abuse violated the Confrontation Clause.

The appellant was indicted for a number of counts of sexual assault and sexual abuse. The indictments were based upon allegations made by the appellant’s step-nephews to their mother and to a “play therapist” that the appellant had engaged in several inappropriate actions with them between November 1996 and November 1999.

CONFRONTATION CLAUSE

Generally (continued)

State v. Shrewsbury (continued)

The children did not testify at trial, and the trial court did not make a specific finding that the children were “unavailable” to testify. The trial court permitted the children’s mother to repeat the statements that the children had made to her regarding the abuse. The trial court also permitted the “play therapist” to testify to the allegations of sexual misconduct that the children had related to her during her counseling session with the children.

On appeal, the appellant asserted two primary contentions. First, the appellant claimed that the testimony of the “play therapist” violated the Confrontation Clause because the trial court did not find the children “unavailable” to testify. Second, the appellant asserted that the testimony of the “play therapist” should not have been permitted because of the nature and mechanisms of “play therapy”.

The Court denied relief on each assertion and affirmed the appellant’s conviction.

First, the Court determined that there was no violation of the Confrontation Clause. The Court based this decision upon syllabus point two of *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999), wherein the Court had stated that the unavailability prong of the Confrontation Clause is required only when the challenged statements are made in a prior judicial proceeding. Citing *Kennedy* and *Pettrey*, supra, the Court noted that the statements made by the children to the “play therapist” were not made in a prior judicial proceeding, and therefore did not invoke the requirement that the unavailability of the children be established.

Syllabus Point 2 - “The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness’s out-of-court statement.” Syl. Pt. 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syllabus Point 3 - “We modify our holding in *James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), to comply with the United States Supreme Court’s subsequent pronouncements regarding the application of its decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to hold that the unavailability prong of the Confrontation Clause inquiry required by syllabus point one of *James Edward S.* is only invoked when the challenged extrajudicial statements were made in a prior judicial proceeding.” Syl. Pt. 2, *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999).

The Court also determined, in accordance with *Ohio v. Roberts*, 448 U.S. 56 (1980) and *Pettrey*, that the statements to the “play therapist” were reliable and did not violate the Confrontation Clause because they fell within a firmly rooted exception to the hearsay rule. As in *Pettrey*, the Court determined that the statements were admissible under W.Va. R.Evid. 804(4), the “Statements for Purposes of Medical Diagnosis or Treatment” exception.

CONFRONTATION CLAUSE

Generally (continued)

State v. Shrewsbury (continued)

Syllabus Point 5 - "For purposes of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception." Syl. Pt. 6, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

Syllabus Point 6 - "The following [is] . . . not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. W.Va. R.Evid. 803(4)." Syl. Pt. 4, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syllabus Point 8 - "When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 9, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001), cert. denied, 534 U.S. 1142 (2002).

The Court summarily disposed of the appellant's second contention regarding the admission of the testimony of the "play therapist", finding that the issue had not been adequately preserved for appellate review.

Affirmed.

Necessity for cross-examination

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

CONFRONTATION CLAUSE

Presence of defendant at critical stages

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

Witness unavailable

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

The appellant, Robin Ladd, was convicted of first-degree murder and two counts of conspiracy to commit murder in the death of her husband, Richard Ladd. Mr. Ladd was shot and killed at his home on October 20, 1998.

The state alleged that the appellant had conspired with Charlie Hodges, her alleged paramour; Jill Hodges, Mr. Hodges' daughter; Oliver "Buddy" Jarrell, the alleged trigger-man; and Allen Mitchell, another alleged paramour, to kill her husband in an effort to obtain real estate and life insurance proceeds in excess of \$800,000.00. The evidence at trial indicated that the appellant and Charlie Hodges traveled to Parkersburg on the evening of the killing to allegedly provide an alibi for each of them. The killing was then accomplished by Jarrell and Jill Hodges.

At trial, the state introduced two out-of-court statements to demonstrate the existence of the conspiracy to murder Mr. Ladd. The first statement was from Allen Mitchell, which indicated that he and the appellant had discussed and formulated plans to kill the decedent. The other statement was from Linda Ankeney, Mitchell's cousin, who indicated that Mitchell had disclosed to her the appellant's plans to kill the victim. These statements were admitted because the trial court found both Mitchell and Ankeney to be "unavailable" during the trial due to the fact that their attorney's were either state legislators or employees of the legislature and were therefore exempt from attending the trial due to conflicts with the schedule of the Legislature.

The Court addressed a number of issues on appeal. However, the Court's primary focus was upon the admission of the Mitchell/Ankeney statements. The Court stated that the statements did not fall within a firmly rooted exception to the hearsay rule; that the statements were not broken down into separate declarations for evaluation for the trustworthiness of each declaration; and that the statements generally lacked the showings of particularized guarantees of trustworthiness as required by the Confrontation Clause. These factors, compounded by the State's confession that admission of the statements were plain error and the prejudicial effect that the statements had on all of the counts in the indictment, enabled the Court to determine each of the convictions required reversal.

CONFRONTATION CLAUSE

Witness unavailable (continued)

State v. Ladd (continued)

The Court also addressed a number of other issues which, as noted in the opinion, would provide “guidance on remand”. These issues included the admission of allegedly gruesome photographs of the victim’s corpse [the Court stated that the trial court must provide a Rule 401-403 analysis]; the trial court’s admission of evidence that the appellant had also allegedly conspired to kill her step-father [the Court held that the admission of this evidence was error]; the admission of certain items seized during separate searches of the Ladd residence; the disqualification of an assistant prosecuting attorney who was married to, and conducted the direct examination of, one of the investigating officers; and the court’s refusal to bifurcate a separate conspiracy charge. The Court also discussed the respective responsibilities of the trial court and counsel in dealing with conflicts between a trial and a term of the Legislature.

Syl. pt. 6 - “Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party’s action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.” Syllabus Point 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. pt. 7 - “The mission of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution is to advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating the truth of the prior statement. An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives.” Syllabus Point 1, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

Syl. pt. 8 - “The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness’s out-of-court statement.” Syllabus Point 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), modified by *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999).

CONFRONTATION CLAUSE

Witness unavailable (continued)

State v. Ladd (continued)

Syl. pt. 12 - “Absent a showing of particularized guarantees of trustworthiness, the admission of a third-party confession implicating a defendant violates the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution. The burden is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.” Syllabus Point 9, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

Syl. pt. 15 - Generally, in criminal trials, trial courts should exercise the utmost caution prior to admitting hearsay testimony pursuant to Rule 804 of the West Virginia Rules of Evidence when the declarant’s unavailability under that rule is due to the fact that his or her lawyer is a State legislator or designated employee of the Legislature, the Legislature is then in regular session, and the legislator or designated employee of the Legislature is exempt from attending to matters pending before tribunals pursuant to *W. Va. Code* § 4-1-17. Trial courts should make every reasonable accommodation, including modification of the trial schedule, to ensure the availability at trial of the lawyer and his client who is a prospective witness. Judges must be mindful of the important duties and responsibilities of members of the Legislature and endeavor to make schedules which are practical and reasonable and which allow legislators to both attend to court duties and serve in the Legislature.

Syl. pt. 18 - “Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse. Syllabus Point 10, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 19 - “When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court’s instruction.” Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

CONFRONTATION CLAUSE

Witness unavailable (continued)

State v. Ladd (continued)

Syl. pt. 21 - "There are three generally recognized exceptions to the exclusionary rule: (1) where evidence sought to be introduced has an independent source, (2) where the evidence would inevitably have been discovered, and (3) where the connection between unconstitutional police conduct and the discovery of the evidence is so attenuated as to remove any taint of the original illegality." Syllabus Point 2, *State v. Hawkins*, 167 W.Va. 473, 280 S.E.2d 222 (1981).

Syl. pt. 23 - A curator of an estate, appointed pursuant to *W.Va. Code* § 44-1-5, who has lawful control of the decedent's premises, is authorized to consent to a search of the premises of the estate and the search of such premises, without a warrant, when consented to by the curator, does not violate the constitutional prohibition against unreasonable searches and seizures.

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

CONTINUANCE

Standard for granting

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

See SENTENCING Presentence investigation and report, When required, (p. 307) for discussion of topic.

CONVICTIONS

Stipulation

Retroactive application

State v. Davisson, 209 W.Va. 303, 547 S.E.2d 241 (2001) (Per Curiam) (Affirmed)

See ARREST Warrantless arrest, Standards, (p. 48) for discussion of topic.

CREDIT FOR TIME SERVED

Jail imposed as a condition of probation

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

CROSS EXAMINATION

Right to confront witness

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

CUMULATIVE ERROR

What constitutes

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

DEADLY WEAPONS

Right of landowner to prohibit on premises

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

DEFENSES

Self-defense

Test for

State v. Headley, 210 W.Va. 524, 558 S.E.2d 324 (2001) (Per Curiam) (Conviction Vacated)

The defendant was indicted for murder. The evidence presented at trial indicated that on the evening of the killing, the defendant and the victim became involved in an altercation at their home. The defendant was struck repeatedly and attempted to leave the home, but was prohibited from doing so by the victim. After retreating to the kitchen area, the defendant procured a kitchen knife and advised the victim that if he came near her again that she would use the knife. The victim came towards her and the defendant stabbed the victim.

At trial, the court ruled that the defendant would not be permitted to present evidence in support of her theory of self-defense, despite the substantial and uncontroverted evidence that the victim had been the aggressor in the fatal altercation.

The Court vacated the conviction. The Court restated the holding of *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978) regarding the elements necessary for an assertion of self-defense. The Court found that the defendant was entitled to use the defense of self-defense, and that the state had not proven beyond a reasonable doubt that she did not act in self-defense.

Syl. pt. 1 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 2 - "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syllabus Point 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

DEFENSES

Self-defense (continued)

Test for (continued)

State v. Headley (continued)

Syl. pt. 3 - "Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syllabus Point 4, *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

Standard of review

Shifting burden of proof

State v. Headley, 210 W.Va. 524, 558 S.E.2d 324 (2001) (Per Curiam) (Conviction Vacated)

See DEFENSES Self-defense, Test for, (p. 107) for discussion of topic.

DESTRUCTION OF PROPERTY

Removal of posted signs

Elements

State v. Srnsky, et. al., ___ W.Va. ___, 582 S.E.2d 859 (No. 30896, May 16, 2003) (Albright, J.) (Reversed)

See OBSTRUCTING AN OFFICER What constitutes obstruction, Failure to identify not obstruction, (p. 250) for discussion of topic.

DESUETUDE

What constitutes

State ex rel. Canterbury v. Blake, ___ W.Va. ___, ___ S.E.2d ___ (No. 31150, June 23, 2003) (Per Curiam) (Writ of Prohibition Granted)

The petitioner, Charles Canterbury, owned a pawnshop in Fayette County. In September 2001, he was indicted for twenty-four counts of violating W.Va. Code § 61-3-51 (1981), which requires, inter alia, that persons, firms or corporations in the business of buying precious metals and gems secure certain documentation from the sellers, and maintain records of and reports such transactions. After the initial indictment was dismissed due to the State's failure to set forth with specificity the items which were the subject of the charges [see *State ex rel Day v. Silver*, 210 W.Va. 175, 556 S.E.2d 820 (2001)], the petitioner was re-indicted for two felony violations of § 61-3-51 in January 2003.

The petitioner sought a writ of prohibition to prohibit the circuit court from proceeding to trial. The petitioner argued that § 61-3-51 had fallen into desuetude due to nonuse and lack of enforcement.

Syllabus Point 3 - "Penal statutes may become void under the doctrine of desuetude if: (1) The statute proscribes only acts that are *malum prohibitum* and not *malum in se*; (2) There has been open, notorious and pervasive violation of the statute for a long period; and (3) There has been a conspicuous policy of nonenforcement of the statute." Syllabus Point 3, *Comm. on Legal Ethics v. Printz*, 187 W.Va. 182, 416 S.E.2d 720 (1992).

The Court determined that because § 61-3-51 was essentially a "regulatory" statute, the statute addressed an act that was *malum prohibitum*, and thus met the first element of the Printz test. The Court also noted uncontradicted statement of the petitioner's counsel that the statute had been violated "for the entire period of time the statute has been in place," thus satisfying the second element. Finally, the Court noted the testimony of the Sheriff of Fayette County, and a private investigator, who each indicated that there had been no apparent compliance with the statute since its inception in 1981.

The Court determined that § 61-3-51 had fallen into desuetude, and that the petitioner could not be made to stand trial for violating the statute.

Writ of Prohibition Granted.

DETAINERS

Credit for time served while detainer pending

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

See AGREEMENT ON DETAINERS Time limits, (p. 27) for discussion of topic.

Time limits

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

See AGREEMENT ON DETAINERS Time limits, (p. 29) for discussion of topic.

DISCOVERY

Failure to disclose

“Corrected” forensic report

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam) (Reversed and Remanded)

See DISCOVERY Failure to provide, (p. 113) for discussion of topic.

Exculpatory evidence

State ex rel. Justice v. Trent, 209 W.Va. 614, 550 S.E.2d 404 (2001) (Per Curiam) (Affirmed)

In this habeas corpus action, the Court affirmed a circuit court decision to grant a new trial to the petitioner. The petitioner had been tried on murder, robbery and conspiracy charges. As part of the evidence against him, and in accordance with an initial laboratory report, an officer testified to the presence of human blood on a t-shirt belonging to the defendant. The prosecutor, however, had failed to provide the defense with a copy of a subsequent laboratory report which indicated that the t-shirt sample was inadequate to determine the existence of human blood. The Court determined, as did the circuit court, that this was potentially exculpatory information which should have been provided to the defendant. The Court did not accept the state’s contention that the defendant had waived the issue by not raising it in his direct appeal, because the existence of the report was apparently not known until after the appeal was denied.

Syl. - “Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed. 2d 312 (1976).

State v. Kearns, 210 W.Va. 167, 556 S.E.2d 812 (2001) (Per Curiam) (Reversed and Remanded for New Trial)

The defendant was charged with the sexual assault of his estranged spouse. The defendant claimed that the spouse had consented to the sexual intercourse. During the trial, his spouse testified that the defendant had not been invited to the home, and that the defendant had not been at the residence on any other occasion except for a solitary visit on the night of their separation.

DISCOVERY

Failure to disclose (continued)

Exculpatory evidence (continued)

State v. Kearns (continued)

After the trial (and the defendant's conviction), the spouse testified in an unrelated matter that the defendant had, in fact, been at the residence on an additional occasion approximately one week before the alleged assault. The defendant moved to set aside the verdict and for a new trial. At the hearing on the motions the state admitted to having knowledge of the additional visit, and also admitted that the spouse had been advised by the prosecutor that, "she was simply not to mention that [at trial]". Despite this notable statement, the trial court denied the motions.

The Court reversed the conviction and remanded for a new trial. The Court noted that the spouse's credibility was a key factor in the trial, and that the evidence which was withheld by the state could have been very material in impeaching the spouse's testimony.

Syl. - "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Notes and other documents used in testimony

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam) (Reversed and Remanded)

See DISCOVERY Failure to provide, (p. 113) for discussion of topic.

Failure to provide

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam) (Reversed and Remanded)

The appellant, Charles Keenan, was charged with killing Mark Lafferty. Prior to trial, the appellant filed a Rule 16 discovery motion and received, inter alia, a report from a State Police chemist indicating the presence of gunshot residue (GSR) on the hands of the victim. The presence of this GSR supported the appellant's claim that Lafferty's death resulted from an accidental discharge of the weapon by Lafferty. As a result of this testing, the appellant prepared to advance the "accidental shooting" defense for his trial.

DISCOVERY

Failure to provide (continued)

State v. Keenan (continued)

Counsel for the appellant also filed a subsequent discovery motion requesting any notes generated by the chemist during the testing procedure. As a result of this motion, the State provided three additional pages, including a lab worksheet and a fax cover sheet dealing with the chain of custody of the residue samples. These pages were consistent with the initial lab report and the appellant's purported defense.

The appellant further requested the recusal of the Fayette County Prosecuting Attorney's Office based upon the prior representation of the appellant, several years earlier, by the prosecuting attorney and one of the assistant prosecutors. This motion was denied by the trial court.

After the trial began, the State provided the appellant with a "corrected" copy of the GSR report. Contrary to the initial report, this report indicated that no test had been performed to detect residue on the hands of the decedent. The police chemist also produced, during his testimony, a number of documents and graphs which had not been provided to the appellant. Upon objection, and based upon the State's failure to provide these document to the appellant, the trial court held the chemist's testimony inadmissible and ordered the jury to disregard the testimony. However, the appellant was convicted of voluntary manslaughter and sentenced to 15 year imprisonment.

The appellant's primary contentions on appeal were (1) that the State's failure to provide prompt and complete discovery prejudiced the outcome of the trial, and (2) that the trial court erred by failing to grant his motion for recusal of the prosecuting attorney's office.

Syllabus Point 1 - "The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syllabus Point 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

The Court held that the State's failure to provide discovery in a prompt and proper manner necessitated the reversal of the conviction and a new trial. The Court noted that under the standards set forth in *State ex rel. Rusen v. Hill*, *supra*, the appellant had clearly been surprised on a fact material to his defense, i.e., the failure to test the decedent's hands for gunshot residue. The Court noted that the late disclosure of this information seriously hampered the preparation and presentment of the appellant's case, and "effectively misled the defense in preparing its entire case".

DISCOVERY

Failure to provide (continued)

State v. Keenan (continued)

The Court also held that the prosecuting attorney's office was not disqualified from prosecuting the case, because (1) there was no showing that the prosecutor's office had acquired privileged information adverse to the appellant's interests in regard to the charges in the present case (the prior representation had occurred 13-14 years prior to present case), and (2) there was no evidence of a direct personal interest or animosity such that the prosecutor's objectivity and impartiality could be questioned.

Syllabus Point 2 - "Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question." Syllabus Point 1, *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987).

Reversed and Remanded for New Trial.

Standard for determining prejudice

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam) (Reversed and Remanded)

See DISCOVERY Failure to provide, (p. 113) for discussion of topic.

Sanctions for failure to provide

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam) (Reversed and Remanded)

See DISCOVERY Failure to provide, (p. 113) for discussion of topic.

Witness list

State ex rel. Sutton v. Mazzone, 210 W.Va. 331, 557 S.E.2d 385 (2001) (Per Curiam) (Writ of Prohibition Granted)

The relator/defendant sought a writ of prohibition to prohibit the trial court from requiring him to provide a list of defense witnesses. The trial court had ordered the defendant to disclose this list, along with the identity, backgrounds and tests to be performed by certain expert witnesses, pursuant to Rule 42.01 of the Trial Court Rules.

DISCOVERY

Witness list (continued)

State ex rel. Sutton v. Mazzone (continued)

The Court ruled that under the circumstances of this case (where the defendant did not seek discovery from the state pursuant to Rule 16), the trial court had abused its discretion by requiring the defendant to disclose the list of witnesses four days before jury selection. The Court cited *State ex rel. Hill v. Reed*, 199 W.Va. 89, 483 S.E.2d 89 (1996), and noted that by requiring the witness list on the day of trial rather than an earlier date assured that the information would be used only for proper *voir dire* and not for impermissible discovery purposes.

The Court also ruled that the trial court, for the purposes of preserving the integrity of physical evidence, can require the defendant to disclose the identity of expert witnesses, along with their backgrounds and the proposed tests to be performed on the evidence.

Syl. - "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an often repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

DOMESTIC VIOLENCE

Enhancement of sentence

Use of out-of-state convictions

State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001) (Albright, J.) (Affirmed in Part, Reversed in Part, and Remanded with Instructions)

The defendant was prosecuted for third offense domestic battery and wanton endangerment with a firearm. The charges stemmed from a two hour incident where the defendant had allegedly brandished a knife and a rifle at the alleged victims and threatened to kill the victims. At trial, the state used two prior convictions in the State of Michigan for enhancement purposes.

The primary issue presented here was the use of out-of-state convictions for enhancement purposes under West Virginia's domestic violence statute. The Court set forth the test for the use of such convictions and found that the state had not met the burden of proof in this case. The defendant's conviction for third offense domestic battery was therefore reversed; however, because the court believed that the state had shown sufficient evidence to support a conviction of first offense domestic battery, the case was remanded for entry of a new sentencing order.

Syl. pt. 1 - Prior domestic violence convictions in other states may be used to enhance the penalty for subsequent domestic violence convictions under West Virginia Code § 61-2-28 (1994) (Repl.Vol. 2000).

Syl. pt. 2 - An out-of-state conviction may be used as a predicate offense for penalty enhancement purposes under subsection (c) of West Virginia Code § 61-2-28 (1994) (Repl. Vol. 2000) provided that the statute under which the defendant was convicted has the same elements as those required for an offense under West Virginia Code § 61-2-28. When the foreign statute contains different or additional elements, it must be further shown that the factual predicate upon which the prior conviction was obtained would have supported a conviction under West Virginia Code § 61-2-28(a) or (b) in order to invoke the enhanced penalty contained in subsection (c).

Syl. pt. 3 - "Whether the out-of-state conviction satisfies the requirements of this State's enhancement statute is a question of law." Syl. Pt. 3, in part, *State v. Williams*, 200 W.Va. 466, 490 S.E.2d 285 (1997).

Syl. pt. 4 - In proving the fact of an out-of-state conviction for punishment enhancement purposes under West Virginia Code § 61-2-28(c) (1994) (Repl. Vol. 2000), the state may introduce a properly authenticated copy of the judgment of conviction that clearly indicates a defendant's identity and the fact of conviction. The conviction order may also include pertinent information regarding the offense and the foreign law under which the conviction was obtained. Additional means of proof include a properly authenticated copy of the warrant, indictment or other charging document, other comparable documents of record, or transcripts which establish the relevant facts pertinent to the offense and the conviction.

DOMESTIC VIOLENCE

Enhancement of sentence (continued)

Use of out-of-state convictions (continued)

State v. Hulbert (continued)

The Court also addressed the issue of whether a defendant could be convicted of wanton endangerment with a firearm in the absence of a discharge of weapon.

Syl. pt. 5 - Because the offense of wanton endangerment with a firearm is defined, not in terms of whether the firearm is discharged, but merely with reference to the commission of "any act," the discharge of a firearm is not an element of West Virginia Code § 61-7-12 (1994) (Repl. Vol. 2000).

DOUBLE JEOPARDY

Implications of invalid plea agreement

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

Larceny by embezzlement v. larceny by fraudulent schemes

State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002) (Per Curiam) (Reversed and Remanded)

See DOUBLE JEOPARDY Multiple punishment, (p. 120) for discussion of topic.

Multiple punishment

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

The petitioner, who was a defendant in a medical malpractice suit, signed two (2) affidavits in connection with the case. Each of the affidavits contained ten (10) separate statements. Determining that the statements were false, the state filed an information charging the petitioner with twenty misdemeanor counts of false swearing. The petitioner sought a writ of prohibition from the Court, arguing that it would be a violation of Double Jeopardy to permit a trial on more than two counts in the information.

The Court agreed with the petitioner. The Court examined the language of the statute, West Virginia Code, § 61-5-2, to determine the proper “unit of prosecution”. The Court noted the distinction between false swearing and perjury charges and the language of each statute. The Court held that since there was no clear legislative intent to permit multiple punishments for a single act of false swearing, a trial such as that contemplated by the state herein would violate the prohibition against double jeopardy contained in Article III, § 5 of the West Virginia Constitution.

Syl. pt. 1 - “In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).” Syl. Pt. 1, *Farber v. Douglas*, 178 W.Va. 491, 361 S.E.2d 456 (1985).

DOUBLE JEOPARDY

Multiple punishment (continued)

State ex rel. Porter v. Recht (continued)

Syl. pt. 2 - An affiant who commits the act of swearing to the veracity of one or more matters set forth in an affidavit may only be charged with a single count of false swearing within the meaning of West Virginia Code § 61-5-2 (1923) (Repl. Vol. 2000).

State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was an employee of West Virginia University. In January 2000, she was indicted by a Monongalia County grand jury on charges of falsifying accounts, larceny by embezzlement, and larceny by fraudulent schemes. Following her conviction in July 2000, she was sentenced to three concurrent one-to-ten year sentences, but these sentences were suspended and she was placed on probation.

On appeal, the appellant claimed (1) that her convictions for larceny by embezzlement and larceny by fraudulent schemes violated her constitutional protections against double jeopardy, and (2) that testimony regarding her pre-arrest silence constituted plain error.

Syllabus Point 1 - “[A] double jeopardy claim [is] reviewed de novo.” Syllabus Point 1, in part, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996).

Syllabus Point 2 - “The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.’ Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).” Syllabus Point 2, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syllabus Point 3 - “In the absence of proof that a defendant obtained ‘services’ by a fraudulent scheme, every element necessary for a conviction of larceny by fraudulent scheme under West Virginia Code § 61-3-24d (1995) (Repl.Vol.2000) is also an element for conviction of an agent or employee for larceny by embezzlement under West Virginia Code § 61-3-20 (1929) (Repl.Vol.2000).” Syllabus Point 9, *State v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (2001).

The State conceded the appellant’s contention that her convictions for larceny by embezzlement and larceny by fraudulent schemes violated double jeopardy. The Court agreed, citing the holding of *State v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (2001), which was decided after the appellant’s convictions. As in *Rogers*, the Court held that the remedy for the double jeopardy violation was re-sentencing and not a new trial.

DOUBLE JEOPARDY

Multiple punishment (continued)

State v. Brown (continued)

The Court also held that testimony during the trial from an auditor to the effect that the appellant did not appear at a scheduled meeting or otherwise respond to his inquiries during the initial investigation of the matter did not amount to plain error. The testimony was not objected to at trial, and the Court pointed out that the admission of the auditor's testimony did not constitute error, plain or otherwise.

Syllabus Point 4 - "This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record." Syllabus Point 4, *State v. Browning*, 199 W.Va. 417, 485 S.E.2d 1 (1997).

Syllabus Point 5 - "For the purposes of West Virginia's 'plain error' rule, a 'plain' error is one that is clear and uncontroverted at the time of appeal." Syllabus Point 2, *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996).

Reversed and Remanded for Entry of New Sentencing Order.

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001) (Albright, J.) (Reversed and Remanded)

The defendant was convicted of four separate felony offenses regarding his computer business dealings with two different companies. He was convicted of two counts of depriving another of property by fraudulent schemes under *W. Va. Code*, § 61-3-24d (as amended); one count of obtaining property by false pretense under *W. Va. Code*, § 61-3-24 (as amended), and one count of embezzlement under *W. Va. Code*, § 61-3-20 (as amended).

The Court reviewed the defendant's convictions and concluded that two of the defendant's convictions constituted multiple convictions for the same offense and therefore violated double jeopardy protections. The Court reversed and remanded the matter for new orders of conviction and sentencing.

Syl. pt. 4 - "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.' Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977)." Syl. Pt. 2, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

DOUBLE JEOPARDY

Multiple punishment (continued)

State v. Rogers (continued)

Syl. pt. 6 - “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” Syllabus Point 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).” Syl. Pt. 6, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 7 - The provision in West Virginia Code § 61-3-24d (1995) (Repl. Vol. 2000) [defining the crime of larceny by fraudulent scheme] found in subsection (c), which reads, “A violation of law may be prosecuted under this section notwithstanding any other provision of this code,” does not express a clear legislative intent to create a separate and distinct offense, with separate, additional punishment for the same acts.

Syl. pt. 8 - Every element necessary for a conviction of larceny by false pretense under West Virginia § 61-3-24 (1994) (Repl. Vol. 2000) is also an element for conviction of larceny by fraudulent scheme under West Virginia Code § 61-3-24d (1995) (Repl. Vol. 2000).

Syl. pt. 9 - In the absence of proof that a defendant obtained “services” by a fraudulent scheme, every element necessary for a conviction of larceny by fraudulent scheme under West Virginia Code § 61-3-24d (1995) (Repl. Vol. 2000) is also an element for conviction of an agent or employee for larceny by embezzlement under West Virginia Code § 61-3-20 (1929) (Repl. Vol. 2000).

Separate trials in magistrate and circuit courts

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

DOUBLE JEOPARDY

Test for

Legislative intent

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Accuracy inspection reports

Admissible as public record

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

See JURY Jury interrogatories, Prohibited in criminal cases, (p. 226) for discussion of topic.

Blood tests

Improper coercion by police officer

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

Following his arrest for DUI, the appellant was transported to a state police office in Morgantown for the administration of chemical testing. When the appellant refused to take the chemical breath test, the arresting officer asked the appellant if he would agree to provide a blood sample for alcohol testing. When the appellant refused, the officer advised the appellant that he was going to prepare and obtain a search warrant to obtain the blood sample. Faced with this information, the appellant provided a blood sample to the officer.

The appellant filed a motion to suppress the results of the blood test. The appellant claimed that he had requested to speak with an attorney before consenting to the test but was denied this request by the officer. This motion was denied, and the appellant was subsequently convicted of driving under the influence - third offense and driving on a revoked license - DUI related.

On appeal, the Court did not address the appellant's assertion of the denial of his right to counsel. Although the issue was not raised by the appellant, the Court reviewed instead the propriety of the police officer's actions in advising the appellant that he was going to obtain a search warrant to secure a sample of the appellant's blood.

The Court reversed the appellant's DUI conviction on the grounds that *W. Va. Code*, § 17C-5-4(d), does not authorize the issuance of a search warrant to compel the taking of blood from a suspect who has refused to take a blood test. This provision states that if a "person arrested refuses to submit to [a] blood test, then the law enforcement officer making the arrest shall designate either a breath or urine test to be administered." The Court noted that *W. Va. Code*, § 17C-5-7(a), explicitly provides that if a person refuses to take a designated secondary chemical test, the test "shall not be given".

DRIVING UNDER THE INFLUENCE

Blood tests (continued)

Improper coercion by police officer (continued)

State v. McClead (continued)

The Court then determined that the appellant did not voluntarily consent to the blood test. The Court held that due to the “subtle coercion” of the police officer, who “mislead and misinformed” the appellant regarding the propriety of the search warrant, the Court could not conclude that the consent for the blood test was voluntary.

Syl. pt. 1 - “When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court’s factual findings are reviewed for clear error.” Syllabus point 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Syl. pt. 2 - “This Court’s application of the plain error rule in a criminal prosecution is not dependent upon a defendant asking the Court to invoke the rule. We may, *sua sponte*, in the interest of justice, notice plain error.” Syllabus point 1, *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998).

Syl. pt. 3 - “Although evidence acquired by consent is admissible against the accused in trial, mere submission to colorable authority of police officers is insufficient to validate a ‘consent’ search or to legitimize the fruits of the search, and evidence so obtained is incompetent against an accused.” Syllabus point 8, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard for consent

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

Classification as crime of violence

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Effect of acquittal in administrative proceeding

Choma v. W.Va. Division of Motor Vehicles, 210 W.Va. 256, 557 S.E.2d 310 (2001) (Starcher, J.) (Revocation of License Reversed)

The petitioner appealed the circuit court's affirmation of the Commissioner's order revoking her driver's license for a DUI arrest. Following her arrest, the petitioner made a timely request for an administrative hearing. The petitioner was acquitted of the criminal charge, but nonetheless subsequently lost her administrative hearing.

The Court reversed the revocation and ordered reinstatement of the petitioner's license. The primary grounds for reversal appear to be the arbitrary and capricious manner in which the Commissioner evaluated the evidence presented. The Court determined that the decision was clearly contrary to the weight of the evidence.

Perhaps the most noteworthy portion of this opinion is the Court's determination that the commissioner must take into account the results of related criminal proceedings when making administrative determinations. The Court's rationale was simple: if proof of a criminal conviction is dispositive of the administrative proceeding, then "fundamental fairness" requires that proof of an acquittal should be admissible and have weight in the same proceeding.

Syl. pt. 3 - In administrative proceedings under *W.Va. Code*, 17C-5A-1 *et seq.*, the commissioner of motor vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the commissioner, when evidence of such results is presented in the administrative proceeding.

Intoxilyzer test

Standards for test

Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687 (2002) (Per Curiam) (Affirmed)

In this consolidated appeal, appellants Hanson and Massey challenged the admission of breath test results being utilized in their respective actions. Specifically, the appellants claimed that the "one-sample" protocol used in breath testing (*i.e.*, the testing of only one sample of an arrestee's breath) did not meet the evidentiary threshold of scientific reliability.

DRIVING UNDER THE INFLUENCE

Intoxilyzer test (continued)

Standards for test (continued)

Hanson v. Miller (continued)

Syl. pt. -“In the trial of a person charged with driving a motor vehicle on the public streets or highways of the state while under the influence of intoxicating liquor, a chemical analysis of the accused person’s blood, breath or urine, in order to be admissible in evidence in compliance with provisions of *W. Va. Code*, 17C-5A-5, ‘must be performed in accordance with methods and standards approved by the state department of health.’ When the results of a breathalyzer test, not shown by the record to have been so performed or administered, are received in the trial evidence on which the accused is convicted, the admission of such evidence is prejudicial error and the conviction will be reversed.” Syllabus Point 4, *State v. Dyer*, 160 W.Va. 166, 233 S.E.2d 309 (1977).

The Court held that the appellants had failed to demonstrate that a one-sample protocol is an improper administration of the breathalyzer machine under *Dyer*.

The Court also denied the appellant’s claim that the one-sample testing protocol was so “inherently unreliable” as to be inadmissible under Rule 702 of the *W.Va. Rules of Evidence* and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993). The Court noted that the appellants did not present evidence or proof that when a two-sample protocol is used that there are in fact a significant number of cases when the machine gives different results for different samples.

Mandatory bifurcation of prior offenses

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

The appellant sought to appeal his convictions for third offense driving under the influence and driving on a revoked license, DUI related.

The appellant was arrested on June 26, 1998 after his vehicle was observed driving at a high rate of speed in the city of Martinsburg. The vehicle was stopped outside the city limits of Martinsburg by a city police officer. The appellant did not successfully complete the field sobriety tests and refused the secondary chemical breath test. The appellant was charged in magistrate court with third offense driving under the influence and driving on a revoked license, DUI related. The appellant invoked his right to a trial in magistrate court on the misdemeanor driving on a revoked license charge. The severance was permitted, but at the time of the hearing the magistrate granted a motion by the State to dismiss the complaint. The appellant was subsequently indicted by the grand jury for both charges, and was convicted after a two-day jury trial.

DRIVING UNDER THE INFLUENCE

Mandatory bifurcation of prior offenses (continued)

State v. McCraine (continued)

The appellant assigned a number of errors, including (1) whether the testimony of the arresting officer should have been suppressed because it involved information obtained during an invalid arrest outside the officer's jurisdiction; (2) whether the third offense DUI charge should have been dismissed because one of the predicate DUI convictions resulted from an uncounseled guilty plea; (3) whether the two charges should have been severed due to the prejudicial effect of trying them in a single proceeding; (4) whether a judgment of acquittal should have been entered with regard to the driving revoked for DUI charge because the State failed to prove knowledge of the revocation as an essential element of the crime; (5) whether the pending DUI charge should have been bifurcated from consideration of proof of prior convictions; and (6) whether the jury should have been instructed that first offense DUI and second offense DUI are lesser included offenses of third offense DUI.

In analyzing these assignments, the Court determined that (1) the appellant's motion to suppress the officer's testimony was correctly denied, as *W. Va. Code* § 8-14-3 permits a municipal officer to leave their territorial jurisdiction in order to effect a pursuit and arrest, within the same county, for a violation which occurred within the municipal boundary; (2) the State presented the appellant's written waiver of counsel for the predicate conviction, and the appellant did not present evidence otherwise indicating that the waiver was not knowingly and intelligently made; and (3) under existing precedent at the time, the trial court did not abuse its discretion in denying the appellant's motion to sever; however, the Court cautioned that since the matter was being remanded on other grounds, the trial court should permit severance under the principles announced in *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002).

Syllabus Point 3 - "The right of the defendant in a criminal proceeding to the assistance of counsel is a fundamental right, the waiver of which will not be presumed by the failure of the accused to request counsel, by the entry of a guilty plea or by reason of a record silent concerning the matter of counsel and the conviction of a defendant in the absence of counsel or of an affirmative showing of an intelligent waiver of such right is void." Syl. Pt. 1, *State ex rel. Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 (1965).

Syllabus Point 5 - "West Virginia Code § 50-5-7 (1976) (Repl. Vol. 2000), granting the right to trial in magistrate court, is couched in terms of a right rather than simply a procedural norm. It is designed to grant a person first charged in magistrate court the right to maintain the action in magistrate court. In applying this statute, courts should attempt to provide the statute as much force and effect as possible without impinging upon established double jeopardy principles." Syl. Pt. 9, *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002).

DRIVING UNDER THE INFLUENCE

Mandatory bifurcation of prior offenses (continued)

State v. McCraine (continued)

The Court reversed the convictions and remanded the matter based on the appellant's remaining assignments of error. First, in a new syllabus point, the Court held that in prosecutions for driving on a revoked license, DUI-related, under *W. Va. Code*, § 17B-4-3(b), it is necessary for the State to prove that a defendant has knowledge of the revocation of his/her license.

Syllabus Point 10 - Knowledge of the revocation of a driver's license is an element of the offense set forth in West Virginia Code § 17B-4-3(b) (Repl. Vol. 2000) of driving while one's license is revoked for driving under the influence. Prima facie evidence of knowledge of the revocation of a license to drive a motor vehicle is established by the State offering proof of mailing the notice of revocation to the licensee in compliance with West Virginia Code § 17C-5A-1 (1994) and 17A-2-19 (1951), (Repl. Vol. 2000). Defendants may rebut the inference of knowledge of the revocation, although lack of knowledge must be the result of something other than a defendant's wrongful or dilatory conduct.

Second, the Court reviewed the standards enunciated in *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999) regarding bifurcation of prior offenses in DUI prosecutions. In *Nichols*, the Court determined that a defendant who requested bifurcation of prior offenses from a subsequent offense had to present satisfactory evidence constituting a "meritorious claim" which might defeat the validity of a prior conviction. The Court held that such bifurcation requests are non-discretionary, and that requiring a defendant to disclose the evidence constituting a "meritorious claim" prior to the State's case-in-chief "denies the defendant a fair trial based on the principles of our criminal justice system."

Syllabus Point 11 - A trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. To the extent that our decision in *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999), conflicts with this holding it is hereby modified.

The Court noted that the appellant's final assignment regarding lesser-included offenses was essentially moot in light of the Court's ruling with respect to the DUI charge.

Reversed and remanded.

DRIVING UNDER THE INFLUENCE

Revocation of license

Refusal of designated chemical test

Butcher v. Miller, 212 W.Va. 13, 569 S.E.2d 89 (2002) (Per Curiam) (Reversed)

The appellant was stopped for driving at night without headlights. The police officer suspected that the appellant was under the influence of alcohol and administered three field sobriety tests. The police officer then read a standard implied consent form to the appellant, informing him that should he refuse to take the designated secondary chemical test his drivers license “may” be suspended for at least a year and up to life. The appellant refused to take the chemical breath test, and was arrested for second offense driving under the influence.

The police officer forwarded to the Commissioner his report indicating that the appellant had refused to take the designated test. The Commissioner subsequently entered an order revoking the appellants license. The appellant exercised his right to an administrative hearing, after which the Commissioner’s initial decision was upheld. The Commissioner’s decision was appealed to the circuit court, which affirmed the Commissioner’s decision. The appellant contended on appeal that the police officer’s use of the word “may” was erroneous because, under *W.Va. Code* § 17C-5-7(a) (2000), he should have been informed that the revocation was mandatory, not discretionary.

The Court agreed with the appellant. The Court noted that the clear and unambiguous language of the statute requires a driver be advised that his refusal to submit to the designated secondary test “will” result in the revocation of the license. The Court noted that the use of the word “may” indicated discretionary action, and did not convey to the appellant that no discretion existed on the part of the Commissioner in regard to his refusal to take the designated chemical test.

Syl. pt. 1 - “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 2 - “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syllabus point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

Sentencing

Stipulation to prior conviction

State v. Evans, 210 W.Va. 229, 557 S.E.2d 283 (2001) (Per Curiam) (Reversed and Remanded)

See STIPULATIONS Driving under the influence, (p. 329) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Severance of driving while revoked charge

State v. Haden, ___ W.Va. ___, 582 S.E.2d 732 (No. 30650, February 28, 2003) (Per Curiam) (Reversed and Remanded)

The appellant was indicted for driving under the influence, third offense; driving on a revoked license - DUI related; and possession of a controlled substance. Several weeks prior to trial, the State filed a motion to amend the indictment because the indictment incorrectly stated the date of the offense as May 2, 2000 rather than the correct date of May 2, 2001.

On the day of trial, the trial court granted the State's motion to amend the indictment. The trial court also accepted the appellant's stipulation to his prior DUI convictions. The trial court refused, however, to permit bifurcation of the charge of driving while revoked for DUI from the third offense DUI charge. A jury found the appellant guilty of each of these charges. The trial court subsequently granted the appellant a new trial on the driving while revoked for DUI charge, but denied the appellant's motion for a new trial on the third offense DUI charge.

The appellant asserted on appeal that (1) the trial court had erroneously permitted the State to amend the indictment, and (2) the trial court had committed error in denying his motion to sever or bifurcate the driving on a revoked license charge from the third offense DUI charge.

Syllabus Point 2 - "To the extent that *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955), stands for the proposition that 'any' change to an indictment, whether it be form or substance, requires re-submission to the grand jury for its approval, it is hereby expressly modified. An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment." Syllabus point 2, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

The Court held that the amendment of the indictment was a non-prejudicial amendment to the form of the indictment and was thus not error. The Court noted that the appellant had several weeks notice of the proposed amendment, which the Court observed was merely to correct a typographical error. Citing *State v. Adams*, above, the Court affirmed the trial court's finding that the appellant was not prejudiced by the granting of the motion.

The Court held, however, that the appellant was prejudiced by the trial court's refusal to sever his third offense DUI charge from the charge of driving on a revoked license - DUI related. The Court observed that the appellant had stipulated to his prior DUI convictions to avoid the possibility of prejudice arising from a reference to his previous DUI convictions. The Court noted that these stipulations were "all for naught", as reference to the appellant's license revocation permitted the jury to engage in speculation as to the reason for the revocation. Citing *State v. Dews*, 209 W.Va. 500, 549 S.E.2d 694 (2001), the Court held that the appellant's predicament was, "exactly the situation that this Court sought to preclude[.]".

DRIVING UNDER THE INFLUENCE

Severance of driving while revoked charge (continued)

State v. Haden (continued)

Syllabus Point 3 - "When requested by the defendant, the trial of DUI charges and driving while revoked for DUI charges under *W.Va. Code*, 17B-4-3(b) [1999] should ordinarily be severed, when such severance is necessary to avoid unfair prejudice." Syllabus point 5, *State v. Dews*, 209 W.Va. 500, 549 S.E.2d 694 (2001).

Reversed and Remanded.

Standards for admission of chemical breath test

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Stipulation to prior conviction

State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001) (Starcher, J.) (Affirmed in Part, Reversed in Part, and Remanded)

See STIPULATIONS Driving under the influence, (p. 328) for discussion of topic.

State v. Haden, ___ W.Va. ___, 582 S.E.2d 732 (No. 30650, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Severance of driving while revoked charge, (p. 131) for discussion of topic.

DRIVING WHILE REVOKED

Knowledge of revocation as an element of

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

Use of foreign revocation to support conviction

State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) (Per Curiam) (Affirmed)

The primary issue in this case is whether a foreign license revocation can support a conviction under West Virginia's statute for driving on a revoked license - DUI related (*W. Va. Code* 17B-4-3). The Court answered the question in the affirmative.

The defendant was stopped for a moving violation. The police officer discovered that the defendant's Ohio operator's license had been revoked for driving under the influence of alcohol.

In determining the validity of the conviction, the Court noted that while *W. Va. Code* 17B-4-3(b) does not specifically include the provision "by this state or any other jurisdiction" as used in *W. Va. Code* 17B-4-3(a), that the Legislature had certainly not intended to create a situation whereby a person whose license was suspended for speeding would be forbidden to drive on W.Va. highways, while a person whose license had been revoked for DUI would be permitted to do so. The Court also noted the applicability of the Drivers License Compact (*W. Va. Code* 17B-1A-1 to 2), and noted that the compact required that the Ohio conviction be treated the same as if they were in-state convictions.

Syl. pt. 1 - "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 2 - "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

DRIVING WHILE REVOKED

Use of foreign revocation to support conviction (continued)

State v. Euman (continued)

Syl. pt. 3 - “ “ ‘A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.’ Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).” Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983), superseded by statute on other grounds as stated in *State ex rel. Hagg v. Spillers*, 181 W.Va 387, 382 S.E.2d 581 (1989).’ Syl. Pt. 2, *State ex rel. Hall v. Schlaegel*, 202 W.Va. 93, 502 S.E.2d 190 (1998).” Syllabus Point 11, *Rice v. Underwood*, 205 W.Va. 274, 517 S.E.2d 751 (1998).

DUE PROCESS

Adequate time for trial preparation

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

Arbitrary and capricious actions

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

Citation in lieu of arrest

Defects in citation voiding prosecution

State v. Gaskins, 210 W.Va. 580, 558 S.E.2d 579 (2001) (Albright, J.) (Conviction Vacated and Remanded)

See CHARGING DOCUMENT Citation in lieu of arrest, Defects in citation voiding prosecution, (p. 78) for discussion of topic.

Competency of defendant required

State v. Kent, ___ W.Va. ___, ___ S.E.2d ___ (No. 30649, May 23, 2003) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Standards to determine competency to stand trial, (p. 88) for discussion of topic.

Exculpatory evidence

Failure to disclose

State v. Kearns, 210 W.Va. 167, 556 S.E.2d 812 (2001) (Per Curiam) (Reversed and Remanded for New Trial)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 112) for discussion of topic.

DUE PROCESS

Forfeiture

Games-Neely ex rel. W.Va. State Police v. Real Property, 211 W.Va. 236, 565 S.E.2d 358 (2002) (Albright, J.) (Forfeiture of Real Property Reversed)

See FORFEITURE Service of process on owners, (p. 173) for discussion of topic.

Grand jury proceedings

State v. Abdelhaq, ___ W.Va. ___, ___ S.E.2d ___ (No. 30736, April 16, 2003) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 176) for discussion of topic.

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 177) for discussion of topic.

Parole

Agreements

State ex rel. Gardner v. West Virginia Div. of Corrections, 210 W.Va. 783, 559 S.E.2d 929 (2002) (Davis, C.J.) (Writ Granted as Moulded)

See PAROLE Agreements, (p. 254) for discussion of topic.

Parole review

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

DUE PROCESS

Privilege against self-incrimination

Improper closing argument

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Revocation of “good-time” credits

State ex rel. Bailey v. Rubenstein, Commissioner, ___ W.Va. ___, ___ S.E.2d ___ (No. 31148, June 19, 2003) (Per Curiam) (Writ of Mandamus Granted)

See SENTENCING “Good-time” credit, Generally, (p. 305) for discussion of topic.

Right of incarcerated parent to attend abuse/neglect hearing

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Right of inmate to mental health treatment

State ex rel. Riley v. Rudloff, 212 W.Va. 767, 575 S.E.2d 377 (2002) (Davis, C.J.) (Writ of Prohibition)

See PRISON/JAIL CONDITIONS Right of inmate to mental health treatment, (p. 268) for discussion of topic.

Right to competency hearing

State v. Chapman, 210 W.Va. 292, 557 S.E.2d 346 (2001) (Per Curiam) (Affirmed)

See COMPETENCY Evaluation prior to trial, (p. 84) for discussion of topic.

DUE PROCESS

Right to meaningful appellate record

State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379 (2002) (Albright, J.) (Conviction Vacated and Remanded)

See APPEAL Record for appeal, (p. 37) for discussion of topic.

“Three term” rule

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

EQUAL PROTECTION

Credit for time served

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

EVIDENCE

Abuse and neglect

Abandonment

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

Admissibility

Accuracy inspection reports

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

See JURY Jury interrogatories, Prohibited in criminal cases, (p. 226) for discussion of topic.

Chemical breath test

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Deposition

State v. Braham, 211 W.Va. 614, 567 S.E.2d 624 (2002) (Starcher, J.) (Reversed)

See SUFFICIENCY OF EVIDENCE Fraudulent schemes, (p. 330) for discussion of topic.

Drug use by crime victim

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

The appellant, Brandon Johnson, was sixteen years old when he was charged with aggravated robbery. The case was transferred to adult status following a transfer hearing.

EVIDENCE

Admissibility (continued)

Drug use by crime victim (continued)

State v. Johnson (continued)

The victim of the robbery, Todd McAllister, identified the appellant after reviewing a photo array. Testimony presented at a pretrial hearing regarding the photo array procedure indicated that the identification was made by the victim some eight hours after Mr. McAllister had smoked crack cocaine. The trial court granted the State's motion in limine to suppress evidence of the victim's use of crack cocaine, holding that the span of eight hours had so diluted the effect of the drug that it had no effect upon the identification procedure. The appellant was subsequently convicted and sentenced to forty-eight (48) years imprisonment.

The appellant asserted two assignments of error: (1) that the lower court erred in granting the prosecution's motion to suppress evidence of the victim's use of crack cocaine; and (2) that the lower court erred in sentencing the Appellant to forty-eight years in the penitentiary.

The Court held that the trial court did not abuse its discretion in determining that the evidence of crack cocaine use by the victim several hours prior to his identification of the appellant did not affect the validity of the identification process. The trial court noted that testimony by the victim indicated that the effects of the drug typically lasted only one-half hour, and that corroborating evidence from an investigating officer indicated that the victim was not under the influence of the drug at the time of the identification.

Syllabus Point 2 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), overruled on other grounds, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994).

Syllabus Point 5 - "Rule 608(b) of the West Virginia Rules of Evidence limits the admissibility of evidence of specific instances of conduct for the purpose of attacking the credibility of a witness. Such evidence may not be proved extrinsically, but may be inquired into by cross-examination of the witness. Furthermore, the evidence is admissible only if probative of truthfulness or untruthfulness." Syl. Pt. 6, *State v. Murray*, 180 W.Va. 41, 375 S.E.2d 405 (1988).

The Court declined to address the appellant's assertion regarding the proportionality of his sentence. The Court noted that the trial court had specified, pursuant to *W.Va. Code*, § 49-5-16(b) (1997) (Repl. Vol. 2001), that the appellant's sentence would be reviewed when the appellant reached eighteen years of age. Because the trial court had retained authority to reduce or modify the sentence, the Court declined to "prematurely intervene" in the sentencing process.

Affirmed.

EVIDENCE

Admissibility (continued)

Gruesome photographs

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

Hearsay

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

State v. Pettrey, 209 W.Va. 449, 549 S.E.2d 323 (2001) (Maynard, J.) (Affirmed)

In this child sexual assault case, the Court addressed the issue of the admissibility of the testimony of a therapist trained in play therapy. The therapist's testimony was essentially the heart of the state's case, because the trial court had determined that the child victims were "unavailable" based on statements from the therapist and the prosecutor that the children would not be able to testify in court (the trial court did not attempt to speak to the victims, who were eight and six years of age). Over objection, the therapist testified as to the details of alleged sexual abuse and assault that had been related to her during the course of "play therapy" sessions by the children.

On appeal, the Court affirmed the defendant's convictions for sexual assault, incest and sexual abuse by noting the admissibility of such statements under *W.Va.R.Evid.*, Rule 803(4), the "Statement for Purpose of Medical Diagnosis or Treatment" exception to the hearsay rule.

Syl. pt. 8 - The two-part test set for admitting hearsay statements pursuant to *W.Va.R.Evid.* 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis." Syllabus Point 5, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

EVIDENCE

Admissibility (continued)

Hearsay (continued)

State v. Pettrey (continued)

Syl. pt. 9 - When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis of treatment exception to the hearsay rule, West Virginia Rules of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.

Impeachment

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001) (Per Curiam) (Reversed and Remanded)

See EVIDENCE Rule 404(b), (p. 161) for discussion of topic.

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Intoxilyzer test

Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687 (2002) (Per Curiam) (Affirmed)

See DRIVING UNDER THE INFLUENCE Intoxilyzer test, Standards for test, (p. 126) for discussion of topic.

EVIDENCE

Admissibility (continued)

Parole hearings

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

Photographs

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

See ABUSE AND NEGLECT Findings required, (p. 11) for discussion of topic.

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

The defendant was indicted and convicted of first-degree murder. The defendant raised a number of issues on appeal, including (1) the admission of certain crime scene photos, which the defendant claimed were cumulative and redundant; (2) the use of the defendant's prior convictions to impeach his character witness; (3) the admission of a statement given by the defendant following his arrest, and (4) that the trial court committed numerous instructional errors.

The Court found no merit in any of these contentions. The Court held (1) that the trial court properly determined the relevancy of the photographs and properly conducted the Rule 403 "balancing" test; (2) that the Court properly conducted a hearing under *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987) in determining the admissibility of the prior convictions as impeachment evidence; (3) that the defendant did not object to the playing of the audiotape of his statement, and in fact indicated that he was going to request that it be played; and (4) that the malice instruction was proper; that the defendant was not entitled to a lesser included offense instruction for involuntary manslaughter; and that the jury was given a proper cautionary instruction as to the use of the prior convictions.

Syl. pt. 3 - "Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syllabus Point 10, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

EVIDENCE

Admissibility (continued)

Photographs (continued)

State v. Carey (continued)

Syl. pt. 4 - “The cross-examination of a defendant’s character witnesses with regard to questions as to the witness’s knowledge of specific instances of the defendant’s misconduct is confined by certain limitations. There must initially be, by way of an *in camera* hearing, a disclosure of the proposed specific misconduct questions. The state must produce documents or witnesses from which the court may determine whether there is a good faith basis in fact that the misconduct actually occurred and would have been known to some degree in the community. A second limitation requires that the specific misconduct impeachment relate to facts which would bear upon the character traits that have been placed in issue by the character testimony on direct examination. Finally, the court must make the ultimate determination as to whether the probative value of the defendant’s specific incident of misconduct, which is to be the subject of the cross-examination, outweighs its prejudicial value.” Syllabus Point 4, *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987).

Syl. pt. 5 - “Once the court determines at the *in camera* hearing that the specific-misconduct cross-examination of a character witness may proceed, the jury should be informed that its purpose is to test the credibility of the character witness and it is not to be considered as bearing on the defendant’s guilt in the present trial.” Syllabus Point 5, *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987).

Syl. pt. 7 - “ ‘Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.’ Syl. pt. 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964).’ Syllabus point 1, *Estep v. Brewer*, 192 W.Va. 511, 453 S.E.2d 345 (1994).” Syllabus Point 2, *Maples v. West Virginia Dept. of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996).

Syl. pt. 8 - “In instructing a jury as to the inference of malice, a trial court must prohibit the jury from finding any inference of malice from the use of a weapon until the jury is satisfied that the defendant did in fact use a deadly weapon. If the jury believes, however, there was legal justification, excuse, or provocation, the inference of malice does not arise and malice must be established beyond a reasonable doubt independently without the aid of the inference.” Syllabus Point 7, in part, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 9 - “The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).” Syllabus Point 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

EVIDENCE

Admissibility (continued)

Photographs (continued)

State v. Carey (continued)

Syl. pt. 11 - "When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

Prior bad acts

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Psychiatric reports

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

EVIDENCE

Admissibility (continued)

Rape shield statute

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

Requirement of proper foundation

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Rule 404(b)

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001) (Per Curiam) (Reversed and Remanded)

See EVIDENCE Rule 404(b), (p. 161) for discussion of topic.

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

Rule 608(b)

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

EVIDENCE

Admissibility (continued)

Scientific evidence

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Statements of witnesses

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Taped statement of defendant

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

Testimony of unrelated criminal acts

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Accuracy inspection reports

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

See JURY Jury interrogatories, Prohibited in criminal cases, (p. 226) for discussion of topic.

EVIDENCE

Co-defendant's testimony

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Demonstrative evidence

Transcripts of audio/video recordings

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Deposition

Admissibility

State v. Braham, 211 W.Va. 614, 567 S.E.2d 624 (2002) (Starcher, J.) (Reversed)

See SUFFICIENCY OF EVIDENCE Fraudulent schemes, (p. 330) for discussion of topic.

Discretion of court

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

EVIDENCE

Driving under the influence

Admissibility of chemical testing

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Effect of acquittal in administrative proceeding

Choma v. W.Va. Division of Motor Vehicles, 210 W.Va. 256, 557 S.E.2d 310 (2001) (Starcher, J.) (Revocation of License Reversed)

See DRIVING UNDER THE INFLUENCE Effect of acquittal in administrative proceeding, (p. 126) for discussion of topic.

Stipulation to prior convictions

State v. Davisson, 209 W.Va. 303, 547 S.E.2d 241 (2001) (Per Curiam) (Affirmed)

See ARREST Warrantless arrest, Standards, (p. 48) for discussion of topic.

State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001) (Starcher, J.) (Affirmed in Part, Reversed in Part, and Remanded)

See STIPULATIONS Driving under the influence, (p. 328) for discussion of topic.

State v. Evans, 210 W.Va. 229, 557 S.E.2d 283 (2001) (Per Curiam) (Reversed and Remanded)

See STIPULATIONS Driving under the influence, (p. 329) for discussion of topic.

Drug use by crime victim

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

EVIDENCE

Exculpatory evidence

Failure to disclose

State v. Kearns, 210 W.Va. 167, 556 S.E.2d 812 (2001) (Per Curiam) (Reversed and Remanded for New Trial)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 112) for discussion of topic.

Expert testimony

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Gruesome photographs

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Admissibility

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

The appellant, along with a juvenile co-defendant, was charged with first-degree murder in connection with the shooting death of Joan C. Moore. The State alleged that the appellant had fired approximately 11 shots at the victim while she was attempting to enter her car outside of her business. Ms. Moore was struck by gunfire between eight to nine times, but survived long enough to name the appellant as her assailant. At trial, the appellant claimed that the killing was an accident, and that he was only attempting to frighten the victim.

During the trial, and over the objections of the appellant, the state admitted into evidence a number of post-mortem photographs of the victim for the purpose of demonstrating the number and location of the victim's wounds. Subsequently the prosecutor commented, during his closing remarks, that if the jury recommended mercy, the appellant would be eligible for parole and suggested that the parole board, which he characterized as "a bunch of political appointees", might release the appellant.

EVIDENCE

Gruesome photographs (continued)

Admissibility (continued)

State v. Copen (continued)

The appellant was convicted of first degree murder, with no recommendation of mercy. The appellant claimed, *inter alia*, that the trial court erred by (1) admitting gruesome and prejudicial photos of the victim into evidence; (2) not granting a mistrial due to improper remarks of the prosecutor during closing argument, and (3) by making various other trial rulings, the cumulative effect of which was to deprive the appellant of a fair and impartial trial.

The Court denied the appellant's claims. The Court held that under *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), and Rule 401-403 of the Rules of Evidence, the probative value of the photographs far outweighed their prejudicial effect, chiefly due to the substantial number of gunshot wounds. This evidence contrasted with and was relevant to the appellant's claim that he had accidentally shot the victim.

The Court also held that the prosecutor's statements during closing argument regarding the likelihood of the appellant being granted parole was not improper, chiefly because appellant's counsel first broached the issue of parole during his closing argument.

Finally, the Court held that the appellant's other assignments of error were essentially without merit, and thus there was no cumulative error.

Syl. pt. 2 - "Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absence a showing of clear abuse." Syllabus Point 10, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 3 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

Hearsay

State v. Shrewsbury, ___ W.Va. ___, 582 S.E.2d 774 (No. 30597, April 14, 2003) (Per Curiam) (Affirmed)

See CONFRONTATION CLAUSE Generally, (p. 94) for discussion of topic.

EVIDENCE

Hearsay (continued)

Confrontation clause

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Excited utterance

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Prior statements

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Residual exception

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

Identification

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

EVIDENCE

Impeachment

Prior convictions

State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001) (Per Curiam) (Reversed and Remanded)

See EVIDENCE Rule 404(b), (p. 161) for discussion of topic.

Witness unavailable

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Impeachment of witness

Drug use by crime victim

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

Prior convictions of defendant

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

Intoxilyzer test

Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687 (2002) (Per Curiam) (Affirmed)

See DRIVING UNDER THE INFLUENCE Intoxilyzer test, Standards for test, (p. 126) for discussion of topic.

EVIDENCE

Lesser-included offense

State v. Gibson, 209 W.Va. 273, 546 S.E.2d 453 (2001) (Per Curiam) (Reversed and Remanded)

See LESSER INCLUDED OFFENSE Possession with intent to deliver, (p. 236) for discussion of topic.

Photographs

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

Plea agreements of co-defendants

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

The appellant was charged, along with two co-defendants, with aggravated robbery and conspiracy. Each of the co-defendants agreed to cooperate with the state and testified against the appellant.

As a part of its case-in-chief, the state admitted into evidence the written plea agreements of the co-defendants. Each of these agreements contained a provision which stated, “[i]n consideration of the foregoing, [the] State will agree to request a safe placement for defendant in a correctional facility physically separate from that where co-defendant Jessie Swims is housed.”

The appellant challenged the inclusion of this language in the plea agreement and its submission to the jury. He asserted that this language was prejudicial because it permitted the jury to infer that he would be incarcerated in a correctional facility regardless of the outcome of the robbery/conspiracy charges. The trial court overruled the appellants’ objection. The appellant was subsequently convicted of both charges and was given a 120-year sentence for aggravated robbery, and a concurrent 1-5 year sentence for conspiracy.

EVIDENCE

Plea agreements of co-defendants (continued)

State v. Swims (continued)

The appellant raised a number of issues on appeal, including the dismissal for cause by the state of a juror after the completion of *voir dire*; the use of transcripts of a videotape of the robbery; and the admission of a statement of one of the co-defendants regarding an out-of-state murder case. The Court decided, however, to reverse the appellant's convictions based solely upon the failure to redact the objectionable language from the plea agreements.

The Court accepted the appellant's contention that the language in the plea agreement permitted the inference that the appellant would be incarcerated, possibly for an offense other than that before the jury. The Court also noted that the objectionable language implied that the state agreed that the co-defendant's safety was in jeopardy due to their testimony against the appellant which, the Court held, was tantamount to vouching for the veracity of the witnesses. The provision implied facts, the Court held, not otherwise before the jury and that were not proper for jury consideration. The Court's primary reason for redacting the objectionable language was that the language essentially amounted to substantive evidence of the appellant's guilt. The Court noted that, "[t]he language of the plea agreements, in effect, informed the jury that Mr. Swims should be found guilty because of the testimony of [the co-defendants]." The Court observed that had the qualifying word "if" been included in the provision, the language may not have been objectionable.

Syl. pt. 4 - During the direct examination of a co-defendant, a prosecutor may elicit testimony regarding the co-defendant's plea agreement, and may actually introduce the plea agreement into evidence for purposes which include, but are not necessarily limited to: (1) allowing the jury to accurately assess the credibility of the witness; (2) eliminating any concern by the jury that the government has selectively prosecuted the defendant; and (3) explaining how the witness has first-hand knowledge of the events about which he/she is testifying.

Syl. pt. 5 - A trial judge considering whether, or the extent to which, a plea agreement may be used by the prosecution must endeavor to protect the defendant from impermissible uses of the plea agreement, such as using the plea agreement: (1) as evidence of a defendant's guilt, (2) to bolster the testimony of a co-defendant, or (3) to directly or indirectly vouch for the veracity of a co-defendant who has pleaded guilty and then testified against the defendant. To carry out this duty, the trial judge must study the plea agreement with care and redact all prejudicial and irrelevant provisions.

Syl. pt. 6 - A trial court's decision to admit the plea agreement of a co-defendant is an evidentiary ruling which is reviewed for abuse of discretion.

Reversed and Remanded for New Trial.

EVIDENCE

Prior bad acts

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Prior convictions

Use of out-of-state convictions

State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001) (Albright, J.) (Affirmed in Part, Reversed in Part, and Remanded with Instructions)

See DOMESTIC VIOLENCE Enhancement of sentence, Use of out-of-state convictions, (p. 117) for discussion of topic.

Rape shield statute

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

The appellant was convicted of twenty-one counts of sexual assault in the third degree. The allegations against the appellant were made by a former student at the junior high school where the appellant had worked as a teacher and administrator. The student alleged that the appellant had engaged her in a number of sexual acts from 1977 to 1980. The indictment also alleged other acts by the appellant against other female victims between 1959 to 1972. These counts were dismissed because of the *ex post facto* nature of the charges (the statute in question was not enacted until 1976), but several of these victims testified pursuant to Rule 404(b).

The appellant asserted a number of assignments of error on appeal. The Court examined each of these assignments and affirmed the appellant's convictions.

EVIDENCE

Rape shield statute (continued)

State v. Parsons (continued)

First, the appellant asserted that the trial court had improperly applied the rape shield statute (*W.Va. Code* § 61-8B-11[1986]) to prohibit testimony offered by the appellant that he and the victim had engaged in a consensual sexual relationship after the victim had turned sixteen years of age. The Court noted that a portion of the statute addressing the admissibility of evidence of prior sexual conduct between the appellant and the victim would not be helpful to the appellant, chiefly because the victim would have been even younger at the time of the incidents. The Court also noted that the trial court permitted the appellant to introduce other evidence concerning the nature of his relationship with the victim after she had reached the age of maturity. Noting that the statute was “arguably silent” on the precise issue raised by the appellant, the Court determined that the trial court did not abuse its discretion in excluding the other portions of the purported testimony.

The Court also determined that the testimony of the other alleged victims as to similar acts was admissible under Rule 404(b). The Court rejected the appellant’s arguments that the evidence was too remote in time to be admissible, and that the prosecutor’s use of several such witnesses did not amount to improper “shotgunning”, or the admission of an unnecessary quantity of extrinsic bad acts evidence.

Syllabus Point 3 - “Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), it is overruled.” Syl. pt. 2, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

EVIDENCE

Rape shield statute (continued)

State v. Parsons (continued)

Syllabus Point 4 - "Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syl. pt. 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

Third, the Court rejected the appellant's arguments regarding improprieties with the jury, holding that (1) *W. Va. Code* § 52-1-23 (1986) permits a juror beginning service in one term of the court to continue such service into the succeeding term to complete a particular case, and (2) that the trial court did not abuse its discretion in refusing to strike three jurors for cause, none of whom had indicated a particular bias or prejudice against the appellant. The Court went on to reject all of the appellant's other assertions, including (1) the denial of his motion to recuse the trial judge because the judge had encountered one of the 404(b) witnesses at a restaurant; (2) improper instructions to the grand jury, as evidenced by the counts which were dismissed due to their *ex post facto* nature; (3) the passage of time between the relevant events and the initiation of the prosecution; (4) the trial court's failure to give instructions on the issues of battery and jury nullification; and (5) the non-provision of allegedly exculpatory reports prepared by a psychiatrist and a therapist who had treated the victim.

Syllabus Point 5 - "Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. pt. 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syllabus Point 6 - "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).

EVIDENCE

Rape shield statute (continued)

State v. Parsons (continued)

Syllabus Point 7 - "When the mental health records of a prospective witness are sought for the purpose of impeaching the witness' credibility, the circuit court should first examine the records *ex parte* to determine if the request is frivolous. If the court finds probable cause to believe that the mental health records contain material relevant to the credibility issue, counsel should be allowed to examine the records, after which an in camera hearing should be held in which the requesting party's counsel designates the parts of the records he believes relevant, and both sides present arguments on the relevancy of those parts." Syl. pt. 3, *Nelson v. Ferguson*, 184 W.Va. 198, 399 S.E.2d 909 (1990).

Affirmed.

Rule 401

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Rule 403

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

EVIDENCE

Rule 404(b)

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001) (Per Curiam) (Reversed and Remanded)

The defendant was tried for sexual assault in the second degree and burglary. The evidence presented by the state indicated that the defendant had allegedly broken into the victim's apartment and penetrated her vagina with his finger. The state then presented evidence from a witness who testified that the defendant had, twelve years earlier, broken into her apartment and beaten and raped her. The court did not permit the defendant to question this witness as to a recent criminal conviction. The defendant was convicted of first degree sexual abuse and burglary and was sentenced to consecutive prison sentences.

The Court reversed the conviction due to improper admission of Rule 404(b) evidence. Specifically, the Court stated that while 404(b) evidence can be used to show *modus operandi*, as used here, the incidents presented at trial were "not sufficiently similar nor sufficiently unique" to invoke the *modus operandi* principle. The Court noted that when there is a great potential for unfair prejudice if 404(b) evidence is admitted, the legitimate purpose for such evidence must be well shown.

Syl. pt. 1 - "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *W.Va.R.Evid.* 404(b)." Syllabus point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

The Court also noted that the trial court had abused its discretion by refusing to permit the defendant to impeach the witness with evidence of her Ohio misdemeanor conviction of "Complicity in Theft". The Court noted that under Rule 609(a)(2)(B), such evidence would be clearly admissible.

EVIDENCE

Rule 404(b) (continued)

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

“Intrinsic” and “extrinsic” evidence distinguished

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Rule 608

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Rule 608(b)

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

Rule 702

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Rule 803(2)

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

EVIDENCE

Rule 803(4)

State v. Pettrey, 209 W.Va. 449, 549 S.E.2d 323 (2001) (Maynard, J.) (Affirmed)

See EVIDENCE Admissibility, Hearsay, (p. 142) for discussion of topic.

State v. Shrewsbury, ___ W.Va. ___, 582 S.E.2d 774 (No. 30597, April 14, 2003) (Per Curiam) (Affirmed)

See CONFRONTATION CLAUSE Generally, (p. 94) for discussion of topic.

Rule 803(8)

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

See JURY Jury interrogatories, Prohibited in criminal cases, (p. 226) for discussion of topic.

Rule 803(24)

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

Rule 804

Unavailability due to counsel's attendance at legislature

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Rule 804(b)(5)

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

EVIDENCE

Rule 806

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Scientific

Reliability and relevance

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Scientific evidence

Standards for admission

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Scientific reliability

Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687 (2002) (Per Curiam) (Affirmed)

See DRIVING UNDER THE INFLUENCE Intoxilyzer test, Standards for test, (p. 126) for discussion of topic.

Self-incrimination

In re: Daniel D., 211 W.Va. 79, 562 S.E.2d 147 (2002) (Albright, J.) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Self-incrimination, (p. 14) for discussion of topic.

EVIDENCE

Spousal testimony

Marital confidence privilege

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

Stipulation to prior conviction

State v. Evans, 210 W.Va. 229, 557 S.E.2d 283 (2001) (Per Curiam) (Reversed and Remanded)

See STIPULATIONS Driving under the influence, (p. 329) for discussion of topic.

State v. Haden, ___ W.Va. ___, 582 S.E.2d 732 (No. 30650, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Severance of driving while revoked charge, (p. 131) for discussion of topic.

Sufficiency of

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

To support conviction

State v. Braham, 211 W.Va. 614, 567 S.E.2d 624 (2002) (Starcher, J.) (Reversed)

See SUFFICIENCY OF EVIDENCE Fraudulent schemes, (p. 330) for discussion of topic.

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

EVIDENCE

Suppression of

Consent induced by coercion

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

Taped statement of defendant

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

Transcripts of audio/video recordings

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Witnesses

Impeachment of character witness

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

EXPERT WITNESS

Duty to disclose expert witness information

State ex rel. Sutton v. Mazzone, 210 W.Va. 331, 557 S.E.2d 385 (2001) (Per Curiam) (Writ of Prohibition Granted)

See DISCOVERY Witness list, (p. 115) for discussion of topic.

Request for fees

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

See SENTENCING Presentence investigation and report, When required, (p. 307) for discussion of topic.

EX POST FACTO

Amended recidivist statute as violating

State v. Taylor, ___ W.Va. ___, 568 S.E.2d 50 (2002) (Per Curiam) (Affirmed in Part, Reversed in part, and Remanded)

Following the appellant's conviction for grand larceny, the state instituted recidivist proceedings under *W.Va. Code*, § 61-11-18. The trial court subsequently accepted the appellant's plea to the recidivist information and, pursuant to the 2000 amendment to § 61-11-18, doubled the indeterminate sentence imposed by the court on the grand larceny charge.

The appellant asserted (1) that the trial court did not conduct a proper colloquy at the time of his plea to the recidivist information, and (2) that the court's imposition of the recidivist sentence violated *ex post facto* principles.

Syl. pt. 1 - "When a criminal defendant proposes to enter a plea of guilty, the trial judge should interrogate such defendant on the record with regard to his intelligent understanding of the following rights, some of which he will waive by pleading guilty: 1) the right to retain counsel of his choice, and if indigent, the right to court appointed counsel; 2) the right to consult with counsel and have counsel prepare the defense; 3) the right to a public trial by an impartial jury of twelve persons; 4) the right to have the State prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings; 5) the right to confront and cross-examine his accusers; 6) the right to present witnesses in his own defense and to testify himself in his own defense; 7) the right to appeal the conviction for any errors of law; 8) the right to move to suppress illegally obtained evidence and illegally obtained confessions; and, 9) the right to challenge in the trial court and on appeal all pre-trial proceedings." Syllabus Point 3, *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975).

The Court found that while the trial court's plea colloquy was not a letter-for-letter recitation of the litany set forth in *Call*, the court's inquiry was sufficient to assure the Court that the appellant's plea was knowing and voluntary.

The Court held, however, that the trial court's application of § 61-11-18, as amended, violated the *ex post facto* principles set forth in the United States and West Virginia Constitutions. The Court observed that the amendment to § 61-11-18 became effective in June 2000, several months after the offense for which the appellant was convicted.

Syl. pt. 2 - "Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

EX POST FACTO

Dismissal of charges

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

Sexual offender registration act

Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001) (Maynard, J.) (Denial of Writ Affirmed)

This case concerns the denial by a trial court of a writ of prohibition filed by the appellant, Michael Hensler. The appellant was originally convicted in 1989 of four counts of first degree sexual abuse of a minor. The offenses had occurred between 1985 and 1986. In 1992, the Supreme Court of Appeals reversed the conviction, and in 1994 the appellant subsequently entered a plea of no contest to three misdemeanor charges of third degree sexual abuse.

In July 2000, the appellant was advised by the W.Va. State Police that he was required to register as a sexual offender under *W.Va. Code* 15-12-2, as amended. The appellant filed for a writ of prohibition in circuit court, alleging that the Sex Offender Registration Act, as applied to him, violated *ex post facto* principles because it was enacted after the appellant's convictions. The appellant asserted that the Act operated to his detriment, and was thus punitive in nature, because it contained a finding that persons required to register as sex offenders have a "reduced expectation of privacy" (*W.Va. Code* § 15-12-1a(c), as amended).

The Court noted that the Act specifically stated that the provisions of the Act "apply both retroactively and prospectively" under *W.Va. Code* § 15-12-2(a), as amended. The Court cited a case from the State of Washington as authority for the proposition that the Act was not "disadvantageous" to the appellant because it did not alter the standard of punishment for the offense for which he was convicted. The Court went on to find that the purpose of the Act was regulatory in nature and was not designed to enhance or increase the standard of punishment. Because the disadvantages imposed by the Act were not sufficient to make the Act punitive in nature, the Court found no violation of *ex post facto* principles and affirmed the ruling of the circuit court.

Syl. pt. 3 - "Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

EX POST FACTO

Sexual offender registration act (continued)

Hensler v. Cross (continued)

Syl. pt. 4 - The question whether an Act is civil or punitive in nature is initially one of statutory construction. A court will reject the Legislature's manifest intent only when a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the Legislature's intention.

Syl. pt. 5 - The Sex Offender Registration Act, *W. Va. Code* §§ 15-12-1 to 10, is a regulatory statute which does not violate the prohibition against *ex post facto* laws.

FIFTH AMENDMENT

Assertion in abuse/neglect proceedings

In re: Daniel D., 211 W.Va. 79, 562 S.E.2d 147 (2002) (Albright, J.) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Self-incrimination, (p. 14) for discussion of topic.

Right to remain silent at trial

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Pre-trial silence

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

FINES AND COSTS

Dismissal of

State ex rel. Holcomb v. Nibert, 212 W.Va. 499, 575 S.E.2d 109 (2002) (Per Curiam) (Writ of Mandamus Denied)

Between 1988 and 1995 the petitioner was convicted in magistrate court of a number of misdemeanor offenses. Although fines and court costs were assessed on each of the cases, the petitioner failed to pay any portion of the amounts due.

Following the revocation of his driver's license pursuant to West Virginia Code, § 17B-3-3c and § 17B-3-6, the petitioner filed a motion in December 2000 with the circuit court for dismissal of the fines and costs. The petitioner argued that his indigency, and the fact that some of the fines and costs were more than ten years old, mandated dismissal of the assessments.

The circuit court denied the petitioner's motion. The petitioner then filed for a writ of mandamus with the Supreme Court of Appeals.

Syllabus - "The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari. The court shall have appellate jurisdiction in civil cases at law where the matter in controversy, exclusive of interest and costs, is of greater value or amount than three hundred dollars. . . .' W.Va. Const., art. VIII, § 3, *in part*." Syllabus Point 4, *Foster v. Sakhai*, 210 W.Va. 716, 559 S.E.2d 53 (2001).

The Court brushed aside the petitioner's argument that West Virginia Code, § 59-1-36 [1953] permitted dismissal of the fines and costs. The Court noted that § 59-1-36 applies only to administrative fees assessed by state and county agencies, and not to fines and costs assessed for criminal charges by magistrate courts.

Writ of Mandamus Denied.

FORFEITURE

Due process

Games-Neely ex rel. W.Va. State Police v. Real Property, 211 W.Va. 236, 565 S.E.2d 358 (2002) (Albright, J.) (Forfeiture of Real Property Reversed)

See FORFEITURE Service of process on owners, (p. 173) for discussion of topic.

Generally

Games-Neely ex rel. W.Va. State Police v. Real Property, 211 W.Va. 236, 565 S.E.2d 358 (2002) (Albright, J.) (Forfeiture of Real Property Reversed)

See FORFEITURE Service of process on owners, (p. 173) for discussion of topic.

Service of process on owners

Games-Neely ex rel. W.Va. State Police v. Real Property, 211 W.Va. 236, 565 S.E.2d 358 (2002) (Albright, J.) (Forfeiture of Real Property Reversed)

Following the execution of a search warrant on a residence in Berkeley County, the W.Va. State Police arrested three individuals in connection with certain drug offenses. Subsequently, the prosecuting attorney of Berkeley County filed a forfeiture petition in which she alleged that the house and garage were subject to forfeiture as proceeds traceable to the illegal sale of a controlled substance.

The appellant, Hattie Sowers, was the only owner of the property served with a copy of the petition. The petition was not served on a co-owner of the property or on a lien-holder. The appellant filed an answer to the petition, but the answer was filed four (4) days after the statutory 30 day deadline. In her answer, the appellant noted, among other defenses, that the petition had failed to name all of the owners and/or interested parties, as required by statute. The trial court granted the States motion for default judgment, based solely upon the four-day late filing of the answer.

The Courts primary focus on appeal was the issue of the service of the petition. The Court noted that the forfeiture statute required that the petition be served upon the owner or owners of the seized property, as well as upon certain lien-holders. *W.Va. Code*, 60A-7-705(b). The Court noted that the language regarding service was mandatory: that all such owners shall be served. The Court observed that the state was obligated to exercise diligent efforts to identify and serve all owners. Because of the States failure to demonstrate that such diligent efforts were undertaken, and because the remaining co-owner of the property was not served, the Court concluded that default judgment was improper.

FORFEITURE

Service of process on owners (continued)

Games-Neely ex rel. W.Va. State Police v. Real Property (continued)

Syl. pt. 1 - Section 705(b) of the West Virginia Contraband Forfeiture Act, West Virginia Code 60A-7-701 to -707 (1988) (Repl. Vol. 2000 & Supp. 2001), clearly contemplates that all parties having an ownership interest in property that is the subject of a forfeiture petition be served with a copy of the petition, barring the State's inability to identify all such owners after expending diligent efforts to identify the property owners.

Syl. pt. 2 - The State's failure to effect service of a forfeiture petition upon all the owners of property subject to such a petition under the provisions of Section 705(b) of the West Virginia Contraband Forfeiture Act, West Virginia Code 60A-7-701 to -707 (1988) (Repl. Vol. 2000 & Supp. 2001), may result in either dismissal of ongoing forfeiture proceedings or the vacation of any orders entered in such proceedings, barring the State's inability to identify all such owners despite diligent efforts to identify the property owners.

In addition, the Court addressed the issue of the untimely filing of the answer, noting that the clear and unambiguous language of the statute required the court to dismiss an answer if not filed within the requisite 30-day period. The Court also noted the discretionary power of the trial court under Rule 60(b) of the Rules of Civil Procedure to set aside default judgments entered in forfeiture proceedings.

Syl. pt. 3 - The language of West Virginia Code 60A-7-705(d) (1988) (Repl. Vol. 2000), contained in the West Virginia Contraband Forfeiture Act, West Virginia Code 60A-7-701 to -707 (1988) (Repl. Vol. 2000 & Supp. 2001), which states that the court shall enter an order forfeiting the seized property to the state if an answer or claim is not filed within thirty days of the date of service of the forfeiture petition or of the first publication, is mandatory.

Syl. pt. 4 - Based on the fact that forfeiture is generally disfavored as a legal remedy, we determine that the West Virginia Contraband Forfeiture Act, West Virginia Code 60A-7-701 to -707 (1988) (Repl. Vol. 2000 & Supp. 2001), is to be liberally construed in favor of the person(s) whose property rights are to be affected, and strictly construed against forfeiture.

Syl. pt. 8 - A circuit court has discretion under Rule 60(b) of the West Virginia Rules of Civil Procedure to set aside a judgment by default entered pursuant to West Virginia Code 60A-7-705(d) of the West Virginia Contraband Forfeiture Act, West Virginia Code 60A-7-701 to -707 (1988) (Repl. Vol. 2000 & Supp. 2001), for failure to file an answer or claim within thirty days of the date of service of a petition of forfeiture or its first publication.

FOURTH AMENDMENT

Search and seizure

Implied consent to search

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

GRAND JURY

Indictment

“Two term” rule

State ex rel. Shifflet v. Rudloff, ___ W.Va. ___, 582 S.E.2d 851 (No. 30968, May 8, 2003) (Per Curiam)

See “TWO TERM” RULE Indictment, (p. 353) for discussion of topic.

Indictments

Grounds for dismissal

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 177) for discussion of topic.

Improper presentment of indictments

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

Investigating officer as member

State v. Abdelhaq, ___ W.Va. ___, ___ S.E.2d ___ (No. 30736, April 16, 2003) (Per Curiam) (Reversed and Remanded)

The appellant was charged with first degree murder after being discovered in a hotel room with the body of a female acquaintance. The victim of the homicide had been stabbed 233 times. Detective John Wroten of the Wheeling Police Department was one of the officers who secured the crime scene and participated in the collection and marking of evidence obtained from the hotel room and the appellant’s automobile.

Subsequently, Detective Wroten served on grand jury duty in Ohio County. The appellant’s case was one of the cases considered by this grand jury, which indicted the appellant for first degree murder. The precise degree of Detective Wroten’s participation in the grand jury’s consideration of the case was unclear. Detective Wroten subsequently testified on behalf of the State in the appellant’s trial. Despite the appellant’s assertion of an insanity defense, the appellant was convicted of first degree murder and was sentenced to life imprisonment without a recommendation of mercy.

GRAND JURY

Investigating officer as member (continued)

State v. Abdelhaq (continued)

On appeal, the appellant's primary assertion was that the indictment was fatally defective because of the presence of the investigating officer during the grand jury proceedings.

The Court agreed with the appellant, noting that the appellant's case involved the same officer and grand jury as the Court had confronted in *State v. Barnhart*, 211 W.Va. 155, 563 S.E.2d 820 (2002). In *Barnhart*, the Court had determined that Officer Wroten's presence had so compromised the fundamental fairness and integrity of the Grand Jury process as to constitute a violation of the appellant's due process rights. Here, the Court noted that the appellant's case was "inexorably guided by the reasoning and holding of *Barnhart*", thus warranting dismissal of the indictment.

Syllabus Point 1 - "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution requires procedural safeguards against State action which affects a liberty or property interest." Syllabus point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977)." Syl. pt. 2, *State v. Barnhart*, 211 W.Va. 155, 563 S.E.2d 820 (2002).

Syllabus Point 2 - "An appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant." Syllabus point 11, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)." Syl. pt. 3, *State v. Barnhart*, 211 W.Va. 155, 563 S.E.2d 820 (2002).

Reversed and remanded.

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was indicted in January 2000 for malicious assault. Prior to trial, the appellant moved for dismissal of the indictment on the grounds that one of the grand jurors, John Wroten, was one of the investigating police officers in her case. At a hearing on the motion, the officer acknowledged his involvement in the investigation of the case, but testified that he did not participate in the presentation or deliberation on the case, and that he did not vote on the matter. The circuit court ruled that since the officer did not intimidate or influence the other grand jurors, the court was not required to dismiss the indictment. The appellant was subsequently convicted at trial of the misdemeanor offense of battery.

GRAND JURY

Investigating officer as member (continued)

State v. Barnhart (continued)

The Court's analysis of this issue began with a review of the historical sanctity of the grand jury process, and centered on the concept of the "fundamental fairness" of a legally constituted and unbiased grand jury. While acknowledging the officer's non-participation in the consideration of the indictment, and the State's pre-presentment request that Officer Wroten be excused from the grand jury, the Court determined that it would be impossible to ascertain what effect the officer's presence may have had on the remaining grand jurors during the presentment of the case. The Court therefore held that the officer's presence in the grand jury room during the presentment and deliberation on the appellant's case to be violative of the appellant's due process rights under Article III, § 10 of the West Virginia Constitution.

Syl. pt. 1 - "A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment." Syllabus Point 1, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

Syl. pt. 2 - "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

Syl. pt. 3 - "An appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant." Syllabus Point 11, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

HABEAS CORPUS

Competency to stand trial

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Procedures to determine, (p. 87) for discussion of topic.

Generally

State ex rel. Crupe v. Yardley, ___ W.Va. ___, 582 S.E.2d 782 (No. 30972, April 14, 2003) (Per Curiam) (Writ of Habeas Corpus Granted as Moulded)

See HABEAS CORPUS Resentencing purposes, (p. 181) for discussion of topic.

Ineffective assistance of counsel

Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002) (Per Curiam) (Affirmed)

See HABEAS CORPUS Plea agreement, Violation of, (p. 180) for discussion of topic.

Parole agreements

State ex rel. Gardner v. West Virginia Div. of Corrections, 210 W.Va. 783, 559 S.E.2d 929] (2002) (Davis, C.J.) (Writ Granted as Moulded)

See PAROLE Agreements, (p. 254) for discussion of topic.

Plea agreement

Hatfield v. State, 209 W.Va. 292, 546 S.E.2d 774 (2001) (Per Curiam) (Denial of Habeas Corpus Affirmed)

In this appeal of the circuit court's denial of the petitioner's habeas corpus petition, the Court held that trial counsel's urging of his client to accept a plea bargain did not rise to the level of ineffective assistance of counsel. The petitioner had urged that the attorney's advice was based on an inadequate investigation and assessment of the strength of the State's case. The Court noted the evidence against the petitioner and concluded that the attorney was "obviously quite correct" in his assessment.

HABEAS CORPUS

Plea agreement (continued)

Hatfield v. State (continued)

Syl. - “In reviewing counsel’s performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel’s strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” Syllabus Point 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Violation of

Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002) (Per Curiam) (Affirmed)

Following his indictment for murder, the petitioner agreed to plead guilty under a plea agreement with the State. The plea agreement specified that the State would make no recommendation to the court with regard to sentencing, but that the State would reserve, among other rights, the right to address the court with regard to the issue of the petitioner’s acceptance of responsibility and the nature and seriousness of the offense.

At the sentencing hearing, the petitioner’s counsel addressed the petitioner’s age, and noted that the petitioner would be elderly if released from prison many years later. The prosecuting attorney responded to this statement by noting that the victim would “still be dead” at the time of the petitioner’s release. No objection was made to this statement. The court sentenced the appellant to life in the penitentiary without mercy.

Following the denial of his direct appeal, the petitioner filed his *pro se* habeas corpus petition. The petitioner asserted that the prosecutor’s comments relating to the victim constituted a comment on the sentence and was therefore a violation of the plea agreement. The petitioner also asserted that his trial counsel was ineffective in failing to object to the prosecutor’s statement. The court, without appointing counsel and without hearing, denied the petitioner’s claim.

Syllabus - “Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976).

HABEAS CORPUS

Plea agreement (continued)

Violation of (continued)

Mugnano v. Painter (continued)

The Court held that under Rule 4(b) of the Rules Governing Habeas Corpus Proceedings in West Virginia, the circuit court was under no obligation to appoint counsel or conduct a hearing if the court determines that the petition, exhibits, affidavits or other documentary evidence fail to show that the petitioner is entitled to relief.

The trial court determined that the statement in question was embraced in the State's reservation of its right to comment upon the nature and seriousness of the offense and the petitioner's acceptance of responsibility. The Court agreed, stating that the remark was not a recommendation regarding a specific sentence, and therefore did not constitute a violation of the plea agreement.

The Court further held that since the remark did not violate the plea agreement, the petitioner's counsel could not have been ineffective by failing to object to the remark.

Affirmed.

Resentencing purposes

State ex rel. Crupe v. Yardley, ___ W.Va. ___, 582 S.E.2d 782 (No. 30972, April 14, 2003) (Per Curiam) (Writ of Habeas Corpus Granted as Moulded)

The petitioner was sentenced on January 4, 2001 to one to five years imprisonment for a single count of sexual abuse. The petitioner filed his Notice of Intent to Appeal on January 11, 2001, but the appeal was never filed. Following the denial of his motion for a new trial, the petitioner requested a writ of habeas corpus in the circuit court, arguing in part that his right to appeal had been denied. The circuit court granted relief to the petitioner on this ground due to late delivery of the trial transcripts and informed the petitioner that he could be re-sentenced for the purpose of re-starting his appeal period. This action was not taken, however, and the petitioner filed a petition for writ of habeas corpus with the Supreme Court of Appeals, citing, among other grounds, the denial of his right to appeal.

Syllabus Point 1 - "Habeas Corpus is a suit wherein probable cause therefor being shown, a writ is issued which challenges the right of one to hold another in custody or restraint." Syl. Pt. 4, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925).

Syllabus Point 2 - "The sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by due process of law." Syl. Pt. 1, *State ex rel. Tune v. Thompson*, 151 W.Va. 282, 151 S.E.2d 732 (1966).

HABEAS CORPUS

Resentencing purposes (continued)

State ex rel. Crupe v. Yardley (continued)

Syllabus Point 3 - "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), cert. denied, 464 U.S. 831 (1983).

The Court concluded that the petitioner was not entitled to habeas corpus relief on the issue of the denial of his right to appeal, because the circuit court's offer to re-sentence to petitioner was "appropriate and curative of any impairment" the petitioner may have suffered. The Court also held that the petitioner's other assertions of error were more appropriately raised as assignments of error in the appellate forum.

The Court remanded the matter to the circuit court for re-sentencing and granted the writ of habeas corpus solely for that purpose.

Standard of review

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Procedures to determine, (p. 87) for discussion of topic.

Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002) (Per Curiam) (Affirmed)

See HABEAS CORPUS Plea agreement, Violation of, (p. 180) for discussion of topic.

State ex rel. Justice v. Trent, 209 W.Va. 614, 550 S.E.2d 404 (2001) (Per Curiam) (Affirmed)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 112) for discussion of topic.

Parole agreements

State ex rel. Gardner v. West Virginia Div. of Corrections, 210 W.Va. 783, 559 S.E.2d 929 (2002) (Davis, C.J.) (Writ Granted as Moulded)

See PAROLE Agreements, (p. 254) for discussion of topic.

HARMLESS ERROR

Application of evidentiary standards

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

Other evidence of guilt

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

Standards

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

HEARSAY

Admissibility

Excited utterance

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Public records

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

See JURY Jury interrogatories, Prohibited in criminal cases, (p. 226) for discussion of topic.

Statement for purposes of medical diagnosis or treatment

State v. Pettrey, 209 W.Va. 449, 549 S.E.2d 323 (2001) (Maynard, J.) (Affirmed)

See EVIDENCE Admissibility, Hearsay, (p. 142) for discussion of topic.

Confrontation clause

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

HEARSAY

Exceptions

Residual exception

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

The appellant was convicted of five (5) counts of incest and five (5) counts of sexual assault in the second degree. The charges stemmed from allegations made by the appellant's step-daughter in late 1997 and early 1998 that the appellant had engaged in repeated acts of physical abuse and sexual assault. Following his arrest in February 1998, the appellant admitted in a taped statement to police that he had sexual intercourse with his step-daughter less than 10 times beginning in January 1998, but claimed that such acts were consensual. On the first day of trial, the victim failed to appear pursuant to subpoena and the trial court admitted her written statement to the police under the Rule 803(24) and 804(b)(5) residual hearsay exceptions. The victim appeared in court the following day and testified against the appellant.

The appellant asserted a number of errors. First, the appellant claimed that the trial court's admission of the victim's written statement under 803(24) and 804(b)(5) was erroneous. After discussing the requirements for the admission of such evidence under Syllabus Point 5 of *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987), the Court noted that the victim's subsequent appearance at trial and cross-examination as to the statement caused the appellant to suffer no prejudice.

Second, the Court addressed the admission of evidence of several incidents of alleged prior sexual and physical acts by the appellant against the victim several years earlier in the State of Florida. The Court noted that the evidence in question fell under the rules stated in *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), regarding the application of the Rule 404(b) prohibition against evidence of "prior bad acts." The Court noted that defense counsel had referred to this evidence during opening statements, and that counsel apparently intended to use the fact of the victim's recantation of all of these allegations for impeachment purposes. The Court expressed concern over the fact that no *in camera* hearing was held as required under *McGinnis*, but stated that the issue of whether such a failure to request a hearing on the part of the defense counsel was plain error was best left for evidentiary development at a future habeas corpus proceeding. The Court declined to find reversible error, based chiefly on the failure of counsel to object to the evidence.

Third, the Court considered the appellant's claim of evidentiary insufficiency for the convictions for sexual assault in the second degree. Specifically, the appellant claimed that the state had failed to produce evidence of "forcible compulsion", an essential element of this charge. The Court noted the testimony of the victim that she had acquiesced to the appellant's demands for sexual intercourse because both she and her siblings had sustained beatings when she had refused to have sex with the appellant on previous occasions. Viewed in a light most favorable to the prosecution, the Court found that there was sufficient evidence of forcible compulsion.

HEARSAY

Exceptions (continued)

Residual exception (continued)

State v. Johnson (continued)

Finally, the Court summarily dismissed the appellant's claim that the cumulative effect of numerous errors had deprived the appellant of a fair trial.

Syl. pt. 1 - "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syllabus Point 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

Syl. pt. 2 - "In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the state to prove evidence which is relevant and legally connected with the charge for which the accused is being tried." Syllabus Point 16, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 4 - "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 5 - "Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.' To be 'plain,' the error must be 'clear' or 'obvious.'" Syllabus Point 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

HEARSAY

Exceptions (continued)

Residual exception (continued)

State v. Johnson (continued)

Syl. pt. 6 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Statement for purposes of medical diagnosis or treatment

State v. Shrewsbury, ___ W.Va. ___, 582 S.E.2d 774 (No. 30597, April 14, 2003) (Per Curiam) (Affirmed)

See CONFRONTATION CLAUSE Generally, (p. 94) for discussion of topic.

Generally

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Impeachment of declarant

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

HOMICIDE

Competency to stand trial

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Procedures to determine, (p. 87) for discussion of topic.

Murder

Premeditation

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

Sufficiency of evidence

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

IMPEACHMENT

Hearsay declarant

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

The appellant was charged with domestic battery, obstruction of a police officer, and two other charges. The charges stemmed from an incident at the appellant's home involving the appellant and Madylyn Madden, an acquaintance of the appellant. When the police arrived on the scene, both Ms. Madden and another witness, Rayla Garrison, made statements to the police indicating that the appellant had been violent with them. The appellant was arrested after a brief struggle with the police.

Both Ms. Madden and Ms. Garrison failed to appear at the appellant's magistrate court jury trial. The magistrate permitted the investigating officers to testify to the statements made to them by the witnesses at the time of the arrest under the "excited utterance" exception to the hearsay rule. The magistrate refused, however, to permit the appellant to offer impeachment evidence which indicated (1) that Ms. Madden had herself been convicted of domestic battery, and (2) that Ms. Madden had filed similar charges against another boyfriend, which she later recanted. The circuit court affirmed the appellant's convictions for domestic battery and obstruction.

Syl. pt. 2 - "While ordinarily rulings on the admissibility of evidence are largely within the trial judge's sound discretion, a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution." Syl. pt. 3, *State v. Jenkins*, 195 W.Va. 620, 466 S.E.2d 471 (1995).

Syl. pt. 3 - "The Confrontation Clause contained in the Sixth Amendment to the United States Constitution provides: 'In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him.' This clause was made applicable to the states through the Fourteenth Amendment to the United States Constitution." Syl. pt. 1, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 4 - "Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

IMPEACHMENT

Hearsay declarant (continued)

State v. Martisko (continued)

Syl. pt. 5 - "In order to qualify as an excited utterance under *W.Va.R.Evid.* 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition." Syl. pt. 7, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

The Court held that the appellant should have been permitted to impeach the credibility of the absent witness. The Court noted the apparent conflict in the West Virginia Rules of Evidence between Rule 806, which permits the credibility of the declarant of a hearsay statement to be attacked, and Rule 608, which permits inquiry into specific instances of the conduct of a witness on cross-examination. The Court observed the "catch-22" created by these rules: a defendant may have impeachment evidence involving specific instances of the conduct of a hearsay declarant, but such evidence may only be inquired into "on cross-examination".

The Court's holding indicated that, because of the "confusing tension" between Rules 806 and 608, in cases where the conviction may be based entirely upon hearsay evidence, a defendant should have an opportunity to impeach his chief accuser.

[The Court noted that the appellant's obstruction conviction would be unaffected by this ruling, as the evidence for that charge was not based on hearsay evidence.]

Prior convictions

State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001) (Per Curiam) (Reversed and Remanded)

See EVIDENCE Rule 404(b), (p. 161) for discussion of topic.

IDENTIFICATION

Impeachment of identification witness

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam)
(Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

INDICTMENT

Amendment to

State v. Haden, ___ W.Va. ___, 582 S.E.2d 732 (No. 30650, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Severance of driving while revoked charge, (p. 131) for discussion of topic.

Dismissal of

State v. Abdelhaq, ___ W.Va. ___, ___ S.E.2d ___ (No. 30736, April 16, 2003) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 176) for discussion of topic.

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 177) for discussion of topic.

As remedy for violation of agreement on detainees

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

See AGREEMENT ON DETAINERS Time limits, (p. 29) for discussion of topic.

Due process

State v. Abdelhaq, ___ W.Va. ___, ___ S.E.2d ___ (No. 30736, April 16, 2003) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 176) for discussion of topic.

State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002) (Per Curiam) (Reversed and Remanded)

See GRAND JURY Investigating officer as member, (p. 177) for discussion of topic.

INDICTMENT

Essential elements

State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001) (Per Curiam) (Reversed and Remanded, with Directions)

See INDICTMENT Sufficiency of, Driving on a revoked license - DUI related, (p. 193) for discussion of topic.

Sufficiency of

Destruction of property

State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001) (Maynard, J.) (Writ of Prohibition Granted)

See INDICTMENT Sufficiency of, Generally, (p. 194) for discussion of topic.

Driving on a revoked license - DUI related

State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001) (Per Curiam) (Reversed and Remanded, with Directions)

The defendant was indicted for, and convicted of, Driving on a Revoked License - DUI Related - Third Offense. The defendant filed a post-trial motion for correction of sentence, and alleged that the indictment in the case was defective because it did not state the essential elements of the charge.

The defendant's argument was that the portion of the indictment alleging the two prior convictions was insufficient to support the conviction. While the indictment stated that the defendant had been twice previously convicted of driving while suspended/revoked, the indictment did not specify that the prior convictions were for driving while suspended/revoked - DUI related.

The Court first noted that while it is necessary under Rule 12(b)(2) of the Rules of Criminal Procedure to raise an objection to an indictment prior to trial, the failure of an indictment to adequately state the essential elements was a fundamental defect that could be raised at any time. See *State ex rel. Combs v. Boles*, 151 W.Va. 194, 151 S.E.2d 115 (1966).

The Court held that the indictment failed to satisfy the minimum criteria for describing the essential elements of the felony third-offense crime defined by the statute. The Court noted that under *State v. Dews*, 209 W.Va. 500, 549 S.E.2d 694 (2001), prior convictions for driving while revoked for DUI are status elements of the felony third-offense crime of driving while revoked-DUI related, third offense. As such, they are considered essential elements of the offense and an indictment charging such an offense must refer to such prior convictions.

INDICTMENT

Sufficiency of (continued)

Driving on a revoked license - DUI related (continued)

State v. Palmer (continued)

In this case, the Court noted the absence of express language indicating that the prior offenses were DUI-related offenses or any language implying the same. Thus, the indictment was rendered fatally defective.

The Court remanded the case for resentencing for the misdemeanor offense of first-offense driving while suspended/revoked - DUI related.

Syl. pt. 1 - "In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syllabus Point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syl. pt. 2 - "Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syllabus Point 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 3 - "Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted." Syllabus Point 1, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 4 - "In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment." Syllabus Point 1, *State ex rel. Combs v. Boles*, 151 W.Va. 194, 151 S.E.2d 115 (1966).

Generally

State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001) (Maynard, J.) (Writ of Prohibition Granted)

The petitioner, Jonathan Day, sought a writ of prohibition alleging that defects in the indictment rendered the indictment invalid. The Court agreed with the petitioner and ordered the indictment dismissed.

INDICTMENT

Sufficiency of (continued)

Generally (continued)

State ex rel. Day v. Silver (continued)

The petitioner was charged with the misdemeanor offenses of petit larceny and destruction of property. The indictment did not follow the form provided for such indictments in *W. Va. Code* § 62-9-1 [petit larceny] and § 62-9-13 [destruction of property]. Specifically, the Court held (1) that an indictment for larceny must identify with specificity the particular items of property alleged to have been stolen, and (2) that an indictment for destruction of property must identify with specificity the particular items the defendant is charged with destroying. Because the indictments lacked these specifics, the Court granted the writ of prohibition.

Syl. pt. 2 - “An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and *W. Va. R. Crim. P.* 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.” Syllabus Point 6, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999).

Syl. pt. 3 - An indictment for larceny that follows the language of *W. Va. Code* § 62-9-10 is sufficient.

Syl. pt. 4 - An indictment for destruction of property that follows the language of *W. Va. Code* § 62-9-13 is sufficient.

Syl. pt. 5 - In order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles.

Syl. pt. 6 - In order for an indictment for destruction of property to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles.

Syl. pt. 7 - “Assessment of the facial sufficiency of an indictment is limited to its ‘four corners,’ and, because supplemental pleadings cannot cure an otherwise invalid indictment, courts are precluded from considering evidence from sources beyond the charging instrument.” Syllabus Point 2, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999).

INDICTMENT

Sufficiency of (continued)

Generally (continued)

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

Petit larceny

State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001) (Maynard, J.) (Writ of Prohibition Granted)

See INDICTMENT Sufficiency of, Generally, (p. 194) for discussion of topic.

“Two term” rule

State ex rel. Shifflet v. Rudloff, ___ W.Va. ___, 582 S.E.2d 851 (No. 30968, May 8, 2003) (Per Curiam)

See “TWO TERM” RULE Indictment, (p. 353) for discussion of topic.

INEFFECTIVE ASSISTANCE OF COUNSEL

Plea agreement

Hatfield v. State, 209 W.Va. 292, 546 S.E.2d 774 (2001) (Per Curiam) (Denial of Habeas Corpus Affirmed)

See HABEAS CORPUS Plea agreement, (p. 179) for discussion of topic.

Standards for determining

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally (p. 64) for discussion of topic.

State v. Chapman, 210 W.Va. 292, 557 S.E.2d 346 (2001) (Per Curiam) (Affirmed)

See COMPETENCY Evaluation prior to trial, (p. 84) for discussion of topic.

INFORMATION

Recidivist offenses

State ex rel. Keenan v. Hatcher, 210 W.Va. 307, 557 S.E.2d 361 (2001) (McGraw, J.) (Reversed)

See ATTORNEYS Prosecuting attorney, Disqualification, (p. 66) for discussion of topic.

State v. Cavallaro, 210 W.Va. 237, 557 S.E.2d 291 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See RECIDIVIST OFFENSES Procedure for filing information, (p. 289) for discussion of topic.

INSTRUCTIONS

Brandishing as a lesser offense of wanton endangerment

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

Cautionary instruction

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

Discretion

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS “Missing witness” instruction, (p. 201) for discussion of topic.

Erroneous statement of law by prosecutor not cured by

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

Failure to instruct on essential element

State v. Anderson, 212 W.Va. 761, 575 S.E.2d 371 (2002) (Per Curiam) (Reversed)

The appellant was indicted under *W.Va. Code*, § 61-3-18, for transferring stolen property. The appellant had attempted to sell a quantity of camera equipment that he had found beneath a bridge in Morgantown. The appellant was convicted and was given one-year jail sentence, which was suspended, and the appellant was placed on two-years probation.

On appeal, the appellant contended that the circuit court had failed to instruct the jury that the State had to prove beyond a reasonable doubt that the property was stolen by someone other than himself. The appellant cited *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986), which indicated that this provision was a material element of transferring stolen property.

INSTRUCTIONS

Failure to instruct on essential element (continued)

State v. Anderson (continued)

Syllabus Point 1 - "*W. Va. Code*, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct. The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose. "Syllabus Point 1, *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986).

The Court, noting the clear directive of *Taylor* (and the State's concession of error), held that the jury had not been instructed as to an essential element of the offense of transferring stolen property.

Syllabus Point 2 - "The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syllabus, *State v. Miller*, 184 W.Va. 367, 400 S.E.2d 611 (1990).

Reversed.

Generally

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS "Missing witness" instruction, (p. 201) for discussion of topic.

Inference of malice

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

INSTRUCTIONS

Lesser included offense

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

Possession with intent to deliver

State v. Gibson, 209 W.Va. 273, 546 S.E.2d 453 (2001) (Per Curiam) (Reversed and Remanded)

See LESSER INCLUDED OFFENSE Possession with intent to deliver, (p. 236) for discussion of topic.

“Missing witness” instruction

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

In this case, the Court addressed the propriety in a criminal case of the so-called “missing witness” instruction.

The appellant, Shawna James, became involved in a fight at a crowded bar in Charleston, West Virginia. The victim suffered a number of lacerations during the altercation, allegedly from the appellant’s use of a broken bottle during the fight. The appellant was subsequently indicted for malicious wounding.

At trial, appellant’s counsel noted during opening statements that the state would be producing only a few of the numerous witnesses to the incident. The state’s response to this assertion was to request that the charge to the jury include the following language:

The state and the defendant both have the authority to subpoena witnesses to trial. If there is a witness the defendant believes would be helpful to her case, she may subpoena that witness if the state does not.

The trial court included this language in its instruction to the jury. During closing statements, defense counsel noted the failure of the state to call additional witnesses, while the state noted that the defense had the right to subpoena these witnesses as well. The appellant was subsequently convicted of malicious wounding.

INSTRUCTIONS

“Missing witness” instruction (continued)

State v. James (continued)

The Court embarked on a discussion of the “missing witness” instruction. Noting the “cautious” approval of such instructions in civil cases (see *McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1986)), the Court discussed such instructions in the context of a criminal trial. Specifically, the Court noted the appellant’s concerns that the use of such an instruction essentially amounted to a comment by the judge upon the evidence; that it undermined the presumption of innocence; and that the instruction suggests to the jury that a criminal defendant has an obligation to present evidence.

In noting that the instruction was not a “pure” missing witness instruction, the Court examined the instruction to determine whether its use constituted prejudicial error. The Court found that the first sentence of the instruction “raise[d] constitutional concerns” and “serve[d] no useful purpose”, and that the second sentence was “wholly inappropriate” despite being factually and legally correct. The court agreed with the appellant’s assertions cited above, and concluded that the instruction, taken as a whole, was inappropriate.

Despite this holding, the Court found no prejudicial error. The court based this conclusion upon a review of the instructions in their entirety, and determined that the remainder of the instructions fairly advised the jury on the law applicable to the case.

Syl. - “A trial court’s instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court’s discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.” Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). No error.

Refusal to give requested instruction

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

INSTRUCTIONS

Standard of review

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS “Missing witness” instruction, (p. 201) for discussion of topic.

INTENT

As an element of a statutory offense

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

Fraudulent schemes

State v. Braham, 211 W.Va. 614, 567 S.E.2d 624 (2002) (Starcher, J.) (Reversed)

See SUFFICIENCY OF EVIDENCE Fraudulent schemes, (p. 330) for discussion of topic.

Insufficient evidence of

State v. Braham, 211 W.Va. 614, 567 S.E.2d 624 (2002) (Starcher, J.) (Reversed)

See SUFFICIENCY OF EVIDENCE Fraudulent schemes, (p. 330) for discussion of topic.

INVITED ERROR

Failure to preserve objection

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

JOINDER

Mandatory

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

Same act or transaction

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

Severance of charges for trial in magistrate court

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

JUDGES

Acceptance of plea

State ex rel. Farmer v. Trent, 209 W.Va. 789, 551 S.E.2d 711 (2001) (McGraw, J.) (Affirmed)

See PLEA AGREEMENT Factual basis, (p. 262) for discussion of topic.

Appointment due to disqualification

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally, (p. 64) for discussion of topic.

Discretion

Jury bias

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

Disqualification

Procedure

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally, (p. 64) for discussion of topic.

JUDGES

Improper comments to jury

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

The appellant was indicted for various sexual offenses involving his six-year old daughter. Prior to his second trial on these charges (the first ended in a mistrial due to a hung jury), the appellant filed a motion *in limine* to prohibit the state from using the results of an “EIA” test, which allegedly indicated that the victim was afflicted with chlamydia, a sexually transmitted disease. The court denied this motion, finding that the test was reliable and relevant, and permitted the state to introduce evidence regarding the test.

The appellant subsequently presented the testimony of one Dr. Morris, who called into question the reliability of the EIA test results. After Dr. Morris testified, the trial judge, *sua sponte*, informed the jury that he had previously determined that the EIA test results were sufficiently reliable to be admitted into evidence. The appellant was subsequently convicted of several felony offenses.

The appellant’s arguments on appeal were three-fold: (1) that the trial court employed the wrong standard to determine the admissibility of the EIA test results; (2) that the trial court erred by admitting the EIA test results into evidence; and (3) that the trial court improperly commented to the jury as to the reliability of the scientific evidence.

The Court determined that while the trial court may have incorrectly applied the standard for admissibility of scientific evidence enunciated in *Frye v. United States*, 293 F. 1013, 54 App. D.C. 46 (1923), that such error was essentially harmless. The Court noted that the more recent standards set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), are less demanding than the *Frye* standard. Therefore, since the evidence was admissible under the more exacting *Frye* standard, it would have clearly been admissible under the less stringent standards announced in *Daubert* and *Wilt*.

Syl. pt. 1 - “In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court’s initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony’s reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory’s actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.” Syllabus point 2, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

JUDGES

Improper comments to jury (continued)

State v. Leep (continued)

Syl. pt. 2 - “The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both ‘reliable’ and ‘relevant.’ Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert. denied, [511] U.S. [1129], 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), the reliability requirement is met only by a finding by the trial court under Rule 104(a) of the West Virginia Rules of Evidence that the scientific or technical theory which is the basis for the test results is indeed ‘scientific, technical, or specialized knowledge.’ The trial court’s determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review *de novo*. On the other hand, the relevancy requirement compels the trial judge to determine, under Rule 104(a), that the scientific evidence ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’ *W. Va. R. Evid.* 702. Appellate review of the trial court’s rulings under the relevancy requirement is under an abuse of discretion standard. *State v. Beard*, 194 W.Va. 740, 746 [n.5], 461 S.E.2d 486, 492 [n.5] (1995).” Syllabus point 3, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

Syl. pt. 3 - “The question of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113, S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert[.] denied, [511] U.S. [1129], 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994)[,] only arises if it is first established that the testimony deals with ‘scientific knowledge.’ ‘Scientific’ implies a grounding in the methods and procedures of science while ‘knowledge’ connotes more than subjective belief or unsupported speculation. In order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. It is the circuit court’s responsibility initially to determine whether the expert’s proposed testimony amounts to ‘scientific knowledge’ and, in doing so, to analyze not what the experts say, but what basis they have for saying it.” Syllabus point 6, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

Syl. pt. 4 - “When scientific evidence is proffered, a circuit court in its ‘gatekeeper’ role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert[.] denied, [511] U.S. [1129], 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand.” Syllabus point 4, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

The Court also decided, by following the mandates of *Daubert* and its progeny, that the trial court had not abused its discretion by admitting the evidence of the EIA test results.

JUDGES

Improper comments to jury (continued)

State v. Leep (continued)

Syl. pt. 5 - “The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court’s decision will not be reversed unless it is clearly wrong.’ Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991), cert. denied, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991).” Syllabus point 1, *West Virginia Division of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999).

The Court ruled, however, that the trial court had committed reversible error by its remarks to the jury regarding the credibility and reliability of the EIA test. The Court noted the importance of neutrality on the part of a trial court, and held that statements such as that offered by the trial court here effectively instructed the jury as to the weight to be afforded to both the tests and the testimony of the appellant’s expert.

Syl. pt. 6 - “As a general rule, West Virginia courts are not permitted to comment on the weight of the evidence[.]” Syllabus point 3, in part, *State v. Spadafore*, 159 W.Va. 236, 220 S.E.2d 655 (1975).

Syl. pt. 7 - “With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury.’ Syllabus Point 4, in part, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).” Syllabus point 5, *State v. Harris*, 169 W.Va. 150, 286 S.E.2d 251 (1982).

Syl. pt. 8 - “The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded.” Syllabus point 4, *State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981).

Syl. pt. 9 - “ ‘In the trial of a criminal case the jurors, not the court, are the triers of the facts, and the court should be extremely cautious not to intimate in any manner, by word, tone, or demeanor, his opinion upon any fact in issue.” Pt. 7, Syl., *State v. Austin*, 93 W.Va. 704, 117 S.E. 607 [(1923)]’. Syllabus, *State v. Perkins*, 130 W.Va. 708, 45 S.E.2d 17 (1947).” Syllabus point 3, *State v. Crockett*, 164 W.Va. 435, 265 S.E.2d 268 (1979).

JUDGES

Necessity of record for disqualification

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally, (p. 64) for discussion of topic.

Plea agreement

Participation in plea discussions

State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001) (Per Curiam) (Vacated and Remanded)

See COMPETENCY Evaluation prior to trial, (p. 85) for discussion of topic.

Setting aside based on legal impossibility

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

Standards for recusal

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

Standard of review

Juror bias

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

JUDGES

Standard of review (continued)

Scientific evidence admissibility

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

JURISDICTION

Authority of municipal police officer outside jurisdiction

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

Jurisdiction of Magistrate Court

State v. Gaskins, 210 W.Va. 580, 558 S.E.2d 579 (2001) (Albright, J.) (Conviction Vacated and Remanded)

See CHARGING DOCUMENT Citation in lieu of arrest, Defects in citation voiding prosecution, (p. 78) for discussion of topic.

JURY

Bias

Test for

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

Challenging juror for cause

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

State v. Johnston, 211 W.Va. 293, 565 S.E.2d 415 (2002) (Per Curiam) (Conviction Reversed)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 219) for discussion of topic.

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

The appellant was indicted for the felony offense driving under the influence, third offense. During jury selection, the appellant challenged for cause a prospective juror who indicated that she was related to a police officer; that she was related to, or acquainted with, no less than three assistant prosecuting attorneys; that she knew three of the potential trial witnesses, and might be likely to give great weight to the testimony of one of them because she “would tend to think [he] wouldn’t lie”; and that she couldn’t “honestly say ‘no’” when asked if she could put aside her knowledge of the witnesses and the assistant prosecutors. The trial court refused to strike the juror for cause.

JURY

Challenging juror for cause (continued)

State v. Schermerhorn (continued)

At the beginning of the trial, the trial court granted a motion *in limine* from the appellant to preclude the state from introducing the “Accuracy Inspection Test” sheet for the Intoxilyzer 5000 breathalyzer. Despite this ruling, the trial court subsequently permitted witnesses for the state to testify to the accuracy tests and to the eventual results obtained from the appellant.

The appellant presented a number of issues on appeal, chiefly (1) the trial court’s failure to remove the objectionable juror, (2) the trial court’s admission of the results of the Intoxilyzer test, and (3) that the cumulative effect of these errors and others acted to deny the appellant a fair trial.

The Court agreed with the appellant on all of these issues. First, the Court noted that the challenged juror should have been removed, as she was “clearly not free from the suspicion of prejudice or bias”, and noted that the juror’s responses could not be rehabilitated by subsequent questions or retractions.

Syl. pt. 2 - “Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” Syllabus Point 5, *O’Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

Syl. pt. 3 - “Actual bias can be shown either by a juror’s own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.” Syllabus Point 5, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Second, the Court held that it was error for the trial court to permit the state “to do indirectly that which it prohibited it from doing directly – establishing a foundation for the admissibility of the Intoxilyzer results.”

Syl. pt. 4 - “In the trial of a person charged with driving a motor vehicle on the public streets or highways of the state while under the influence of intoxicating liquor, a chemical analysis of the accused person’s blood, breath or urine, in order to be admissible in evidence in compliance with provisions of *W. Va. Code*, 17C-5A-5, ‘must be performed in accordance with methods and standards approved by the State Department of Health.’ When the results of a breathalyzer test, not shown by the record to have been so performed or administered, are received in the trial evidence on which the accused is convicted, the admission of such evidence is prejudicial error and the conviction will be reversed.” Syllabus Point 4, *State v. Dyer*, 160 W.Va. 166, 233 S.E.2d 309 (1977).

JURY

Challenging juror for cause (continued)

State v. Schermerhorn (continued)

Syl. pt. 5 - "Before the result of a Breathalyzer test for blood alcohol administered pursuant to Code, 17C-5A-1, *et seq.*, as amended, is admissible into evidence in a trial for the offense of operating a motor vehicle while under the influence of intoxicating liquor, a proper foundation must be laid for the admission of such evidence." Syllabus, *State v. Hood*, 155 W.Va. 337, 184 S.E.2d 334 (1971).

Finally, the Court observed that the appellant had presented a number of other issues which were "not without merit". The Court noted that these issues were supported by credible argument, and that these issues, taken in combination with the errors listed above, constituted cumulative error which denied the appellant a fair trial.

Syl. pt. 6 - "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

Discharge of juror

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

See SENTENCING Presentence investigation and report, When required, (p. 307) for discussion of topic.

Dismissal for cause

Appropriate time for strike

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Disqualification due to relationship with law enforcement officers

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

JURY

Exclusion of African-American in peremptory strikes

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

The appellant, an African-American, was charged with aiding and abetting an aggravated robbery. The evidence presented at trial indicated that the appellant drove three individuals to a convenience store in Martinsburg and waited in the car as a lookout while the other three individuals committed the robbery. One of the appellant's co-defendants, Yolanda Williams, brandished a firearm during the course of the robbery. One of the defendants also struck the store clerk in the head during the robbery.

After the defendants were arrested, Ms. Williams and another co-defendant, Richard Panell, entered guilty pleas to lesser charges and agreed to testify on behalf of the State. Ms. Williams was subsequently sentenced to a term of 5-18 years in prison, while Mr. Panell received a suspended 1-5 year sentence and was placed on probation. The appellant was convicted of aiding and abetting aggravated robbery, and was sentenced to a term of fifty (50) years imprisonment.

Following the denial of his direct appeal, the appellant filed a habeas corpus petition in circuit court. The circuit court granted the State's motion to dismiss the petition and denied relief.

On appeal of the circuit court's denial of habeas relief, the appellant asserted a number of errors. The appellant's primary assignments of error were that the 50-year sentence imposed by the trial court was excessive and constitutionally disproportionate to those imposed upon his co-defendants, and that the State had improperly exercised a peremptory strike to remove the only African-American on the jury panel.

Syllabus Point 2 - "Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone." Syllabus point 2, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984).

The Court examined the appellant's proportionality argument under the "subjective/objective" test set forth in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). The Court held that while the appellant's sentence was not so severe as to shock the conscience of the court or society, that it was from an objective standpoint disproportionate to the sentences of the co-defendants. The Court noted in support of this holding that the appellant had not entered the store, nor was he armed with a weapon. The Court noted that Ms. Williams, who had brandished the firearm, had received a sentence of 5-18 years, while Mr. Panell had been placed on probation. Therefore, the Court held the sentence of the appellant to be impermissibly disparate to those of his co-defendants.

JURY

Exclusion of African-American in peremptory strikes (continued)

State ex rel. Ballard v. Painter (continued)

Syllabus Point 3 - "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Syllabus point 1, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

The Court also held that the State had improperly exercised a peremptory strike to eliminate the sole African-American from the jury panel. During jury selection, the State had moved to strike the juror on the grounds that the juror worked at the same company as the appellant's father. When subsequent voir dire revealed this assertion to be false, the State claimed that it had struck the juror because the juror worked the night shift at his employment and would be unable to stay awake during the trial. The Court held that this showing was insufficient and was not a facially credible basis for striking the juror in the face of a racial discrimination challenge. The juror had indicated that he would have no problem staying awake during the trial; thus, the Court determined that there was no credible, race-neutral reason for exercising the peremptory strike.

Therefore, based upon the disparate sentence imposed upon the appellant and the improper dismissal of the African-American juror, the Court reversed the conviction and remanded the case for a new trial.

Reversed and Remanded.

Grounds for disqualification

Juror bias/prejudice

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was indicted for attempted burglary. During jury selection, a prospective juror indicated that she was employed by the United States Attorney Generals' Office as a "criminal grand jury coordinator". In response to a question from the trial court, the prospective juror also indicated that based on her experience with grand juries, she believed that it was more likely than not that a person who had been indicted was guilty.

JURY

Grounds for disqualification (continued)

Juror bias/prejudice (continued)

State v. Griffin (continued)

The Court reviewed the trial court's refusal to strike the juror for cause. Noting the holdings of *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996); *State v. Bennett*, 181 W.Va. 269, 382 S.E.2d 322 (1989); *State v. Nett*, 207 W.Va. 410, 533 S.E.2d 43 (2000) and the Court's recent decision in *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002), the Court held that it was error for the trial court to refuse to remove the juror for cause. The Court noted that the juror was clearly biased towards criminal defendants, and that under *O'Dell*, it was error for the trial court to attempt to rehabilitate the juror.

Syl. pt. 1 - "The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary." Syllabus point 4, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 2 - "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." Syllabus point 5, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

State v. Johnston, 211 W.Va. 293, 565 S.E.2d 415 (2002) (Per Curiam) (Conviction Reversed)

The appellant was tried on three charges, including third-offense DUI, fleeing and driving on a revoked license. During jury selection, a prospective juror made a number of comments which indicated that she might not be able to put aside her strong feelings against alcohol consumption. The juror specifically stated that the fact that alcohol was involved in the offenses might, "in some respects", make the appellant guilty in her mind. The trial court denied the defense counsel's motion to strike the juror for cause, forcing the appellant to exercise a peremptory strike to remove the juror.

The Court reversed the appellant's convictions. Citing the juror's "unequivocal" stance against alcohol consumption, the fact that the potential juror had stated that she was not "100 percent certain" that she could put aside such bias, and noting that each of the charges against the appellant contained an element involving the use of alcohol, the Court ruled that the trial court should have granted the motion to remove the juror for cause.

JURY

Grounds for disqualification (continued)

Juror bias/prejudice (continued)

State v. Johnston (continued)

Syl. pt. 1 - "When individual *voir dire* reveals that a prospective juror feels prejudice against the defendant which the juror admits would make it difficult for him to be fair . . . the defendant's motion to strike the juror from the panel for cause should ordinarily be granted." Syllabus point 1, in part, *State v. Bennett*, 181 W.Va. 269, 382 S.E.2d 322 (1989).

Syl. pt. 2 - "A prospective juror who admits a prejudice to an issue central to the outcome of the case cannot negate the prejudice merely by stating they would follow the law as instructed by the court." Syllabus point 2, in part, *Davis v. Wang*, 184 W.Va. 222, 400 S.E.2d 230 (1990).

Syl. pt. 3 - "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." Syllabus point 5, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was convicted of first-degree murder, without a recommendation of mercy, in connection with the September 1999 shooting death of Pamela Cabe.

During jury selection, a prospective juror, Marvin Billings, indicated that he knew one of the state's witnesses and that he would be inclined to give the testimony of the witness greater weight because of his knowledge of the witness. The trial court denied the appellant's motion to strike this juror for cause.

During the state's case-in-chief, the prosecutor asked several of the state's witnesses whether the appellant had shown and/or demonstrated any remorse for the killing. In particular, the prosecutor asked one of the witnesses, a Detective Shumate, whether the appellant had ever expressed remorse during prior courtroom proceedings. The prosecutor also stated during her closing argument that, "[t]here are cases in which the murderer himself says, 'I am so sorry; I am sorry. I beg your forgiveness'". The appellant had not testified on his own behalf.

The appellant asserted a number of assignments of error. Chiefly, the appellant claimed (1) that it was error for the trial court to refuse to dismiss prospective juror Billings for cause because of Billings's potential prejudice; (2) that the prosecutor's presentation of testimony regarding the appellant's lack of remorse violated the appellant's right against self-incrimination; and (3) that the prosecutor's comments during her closing argument also constituted an improper reminder to the jury that the defendant had chosen not to testify at trial.

JURY

Grounds for disqualification (continued)

Juror bias/prejudice (continued)

State v. Mills (continued)

The Court reversed the conviction, based upon the trial court's failure to strike prospective juror Billings. While the Court refused to adopt a *per se* rule requiring automatic disqualification of a juror who had a social friendship with a witness, the Court believed that Mr. Billings had indicated "potential prejudice" to a degree requiring his removal from the jury panel. The Court further noted that Mr. Billings did not at any time disavow the statement that he would be inclined to give the testimony of a particular witness greater weight than that of other witnesses.

Syl. pt. 1 - "The language of *W. Va. Code*, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error." Syllabus Point 8, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995).

Syl. pt. 2 - "A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syllabus Point 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

Syl. pt. 3 - "The object of the law is, in all cases in which juries are impaneled to try the issue, to secure [persons] for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused[.]" Syllabus Point 1, in part, *State v. Hatfield*, 48 W.Va. 561, 37 S.E. 626 (1900).

Regarding the appellant's other assignments of error, the Court reviewed a number of occasions during the trial wherein the prosecutor had asked several different police officers whether the appellant had demonstrated or exhibited any remorse for the killing. The Court noted that while two of these incidents were permissible, the prosecutor's questioning of Detective Shumate as to the appellant's lack of remorse at prior court proceedings constituted an impermissible comment on the appellant's failure to testify at trial, in violation of the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

In a similar vein, the Court held that the prosecutor's comments during closing argument regarding the remorseful actions of murderers in other cases amounted to a direct, improper reference to the appellant's decision not to testify.

JURY

Grounds for disqualification (continued)

Juror bias/prejudice (continued)

State v. Mills (continued)

Syl. pt. 4 - "Remarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitute reversible error and defendant is entitled to a new trial." Syllabus Point 5, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).

Syl. pt. 5 - "It is prejudicial error in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify." Syllabus Point 3, *State v. Noe*, 160 W.Va. 10, 230 S.E.2d 826 (1976), overruled on other grounds by *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 6 - "Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002) (Per Curiam) (Reversed and Remanded for New Trial)

See JURY Challenging juror for cause, (p. 214) for discussion of topic.

Pending criminal charges

State v. Varner, 212 W.Va. 532, 575 S.E.2d 142 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was convicted of first-degree murder. Following the verdict, but prior to sentencing, counsel for the appellant was advised by an alternate juror that the foreperson of the jury had been charged with a drug offense several months prior to the trial. The charges had been dismissed under an agreement between the foreperson and the State. Under the agreement, which the State subsequently admitted was still in effect at the time of the appellant's trial, the foreperson was to undergo drug testing in lieu of prosecution, and that a violation of such testing could result in further prosecution. During *voir dire*, the jury was questioned as to whether any juror had ever been charged with a crime. The foreperson made no response to this inquiry.

JURY

Grounds for disqualification (continued)

Pending criminal charges (continued)

State v. Varner (continued)

The trial court denied the appellant's motion to set aside the verdict. The basis for the trial court's ruling was (1) that the motion was untimely, because a period of time elapsed between the appellant's discovery of the foreperson's legal status and the appellant's motion; and (2) that the appellant had failed to carry his burden of demonstrating that the foreperson was not fair and impartial.

Syllabus Point 1 - "Where a new trial is requested on account of alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct as soon as it was first discovered or as soon thereafter as the course of the proceedings would permit; and if the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct, unless it is a matter which could not have been remedied by calling attention to it at the time it was first discovered. *Flesher v. Hale*, 22 W.Va. 44 (1883)." Syllabus point 5, *McGlone v. Superior Trucking, Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987).

Syllabus Point 2 - "'The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14 of the West Virginia Constitution.' Syllabus point 4, [in part,] *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981)." Syllabus point 4, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The Court determined that the trial court erred in holding that the appellant's motion was untimely. While the Court noted the general rule that issues regarding juror disqualification or misconduct must be immediately raised or are deemed waived, the Court also observed that the rule does not apply if the matter could not be remedied by immediate attention. The Court noted that the juror's conduct here was discovered several weeks after the trial, well beyond the stage where the trial court could have immediately remedied the problem. The Court concluded that the timeliness of the motion was not a relevant issue, and held that the trial court had abused its discretion in denying the motion on such grounds.

The Court also determined, after a "thorough and searching review" of the record, that the appellant had rebutted the presumption of impartiality which attached to the juror. The Court observed that the juror was, at the time of the appellant's trial, a party to a "very unusual" agreement with the State which the juror failed to disclose during *voir dire*. The Court noted that the circumstances of the agreement gave rise to a "well-grounded suspicion" that the juror would favor the State because of the favorable treatment she had received from the prosecuting attorney's office.

JURY

Grounds for disqualification (continued)

Pending criminal charges (continued)

State v. Varner (continued)

The Court concluded that the appellant had demonstrated that he had been denied a fair and impartial jury, and remanded the matter for a new trial.

Reversed and Remanded.

Potential bias/prejudice

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was convicted of the first-degree murder of Phyllis Rogers, an acquaintance with whom he had lived and who had disappeared in 1992. Ms. Roger's remains were discovered in 1994, and the appellant was arrested and charged with the crime in 1998.

During jury selection, the prospective jurors were asked, *inter alia*, (1) if they had ever had a family member who was a victim of a crime of violence, and (2) whether they were acquainted with various state's witnesses. One of the jurors failed to disclose to the court that his mother had been murdered in a domestic violence situation. The same juror also indicated that he knew one of the police officers as an acquaintance, but he did not advise the court that the officer had investigated his mother's murder. (The appellant did not learn of these facts until after his conviction.)

Later, during closing arguments, the prosecutor stated, on more than one occasion and over the objection of appellant's counsel, that "premeditation can be formed in an instant." The judge did not correct the prosecutor, but advised the jury that they were bound by the law as he had instructed them and that they would have a copy of the charge in the jury room.

The appellant's primary assignment on appeal was the issue of the presence of the juror who had failed to disclose potentially disqualifying facts during *voir dire*.

JURY

Grounds for disqualification (continued)

Potential prejudice (continued)

State v. Hatcher (continued)

Syl. pt. 1 - “A motion to set aside a verdict and grant a new trial on the ground that a juror subject to challenge for cause was a member of the jury which returned it, must be supported by proof that the juror was disqualified, that movant was diligent in his efforts to ascertain the disqualification and that prejudice or injustice resulted from the fact that said juror participated in finding and returning the verdict. Such facts must be established by proof submitted to the court in support of the motion, and not from evidence adduced before the jury upon the trial.’ Syl., *Watkins v. Baltimore and Ohio Railroad Company et al.*, 130 W.Va. 268 [43 S.E.2d 219] (1947).” Syllabus Point 2, *State v. Dean*, 134 W.Va. 257, 58 S.E.2d 860 (1950).

The Court held that the juror’s nondisclosure of highly important and potentially disqualifying information, despite the direct inquiry about that information during *voir dire*, had denied the appellant a fair trial.

The Court also held that the prosecutor’s statements regarding premeditation were erroneous. The Court noted that such a “serious and repeated misstatement” of the law, which was in direct conflict with the pertinent law as set forth in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), was not cured by the jury being able to take the charge into the jury room. The Court observed that the jury could have relied on the prosecutor’s repeated erroneous assertions in deciding the issue of premeditation.

Syl. pt. 2 - “Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.” Syllabus Point 5, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 3 - “In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extent that *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70 (1982), is inconsistent with our holding today, it is expressly overruled.” Syllabus Point 6, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

JURY

Grounds for disqualification (continued)

Potential prejudice (continued)

State v. Hatcher (continued)

The Court determined that these errors required reversal of the appellant's conviction.

Standards for disqualification

State v. Varner, 212 W.Va. 532, 575 S.E.2d 142 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Pending criminal charges, (p. 222) for discussion of topic.

Timeliness of motion for dismissal

State v. Varner, 212 W.Va. 532, 575 S.E.2d 142 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Pending criminal charges, (p. 222) for discussion of topic.

Impeachment of verdict

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

Jury interrogatories

Prohibited in criminal cases

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

The appellant was charged with, among other charges, third offense driving under the influence. Among the evidence presented by the State at trial were the results of an intoxilyzer test which indicated that at the time of his arrest, the appellant had a blood alcohol level of .156 percent.

JURY

Jury interrogatories (continued)

Prohibited in criminal cases (continued)

State v. Dilliner (continued)

The appellant countered this evidence by presenting testimony that he had been painting an automobile on the day of his arrest without wearing a protective mask. The appellant presented the expert testimony of a physician who indicated that the chemicals inhaled from the paint by the appellant can metabolize in the human body and be expelled as alcohol, thus causing a false reading on an intoxilyzer.

Prior to deliberations the trial court submitted two “special interrogatories” to the jury. These interrogatories related to the cause of the appellant’s intoxication and whether the appellant had inhaled the paint chemicals to “knowingly” cause himself to become intoxicated.

The appellant contended on appeal that the jury’s responses to the interrogatories were inconsistent with the verdict. The appellant also assigned as error the trial court’s admission of the accuracy inspection reports of the intoxilyzer under Rule 803(8)(b) of the Rules of Evidence.

The Court did not directly address the first issue. Rather, the Court held that special interrogatories, such as the ones utilized in this case, are not permitted in criminal cases. The Court cited both *State v. Boggs*, 87 W.Va. 738, 106 S.E. 47 (1921) and *State v. Bowles*, 109 W.Va. 174, 153 S.E. 308 (1930), and noted that West Virginia Code, § 56-6-5, which provides for the submission of interrogatories to a jury, did not apply in criminal cases. The Court noted that the use of such interrogatories, absent a specific statutory authorization, constitutes an impermissible intrusion into the province of the jury, and are contrary to the basic principle that a jury verdict be free from “extraneous influences”. Based solely upon these grounds, the Court reversed the appellant’s conviction.

Syl. pt. 1 - “[W.Va.] Code, 56-6-5, which provides for the submission of interrogatories to a jury in the trial of any issue or issues does not apply to trials in criminal cases.” Syllabus Point 5, *State v. Greater Huntington Theater Corp.*, 133 W.Va. 252, 55 S.E.2d 681 (1949).

Syl. pt. 2- The submission of special interrogatories to a jury in a criminal case when not authorized by statute constitutes reversible error.

On the issue of the admission of the accuracy inspection reports, the Court adopted the holding of a number of other jurisdictions in finding that such reports are admissible under the hearsay exception contained in Rule 803(8)(b). The primary reasons for this holding were (1) that the reports are prepared as part of an administrative function; (2) that they are performed in accordance with the Code of State Rules; (3) that they contain findings which are “observed pursuant to duty imposed by law”, thus making it a matter of which there is a “duty to report”; and (4) that they are not prepared under “adversarial circumstances”, *i.e.*, that they are not prepared pursuant to the investigation of a particular person.

JURY

Jury interrogatories (continued)

Prohibited in criminal cases (continued)

State v. Dilliner (continued)

Syl. pt. 3 - A record of the accuracy inspection of an intoxilyzer or breathalyzer machine performed by a certified breath test operator and prepared in accordance with 64 C.S.R. §§ 10-7.1, *et seq.*, is admissible under the public records exception to the hearsay rule found in *W.Va.R.Evid.* 803(8)(B).

Syl. pt. 4 - The law enforcement limitation on admissibility of public records found in *W.Va.R.Evid.* 803(8)(B) does not prohibit the admission under Rule 803(8)(B) of a record of the accuracy inspection of an intoxilyzer machine performed by a certified breath test operator and prepared in accordance with 64 C.S.R. §§ 10-7.1, *et seq.*, where the certified breath test operator is a law enforcement officer. The accuracy check of an intoxilyzer is an administrative function that is not performed pursuant to the investigation of any particular person.

Jury view

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

See SENTENCING Presentence investigation and report, When required, (p. 307) for discussion of topic.

Misconduct

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

The appellant and the victim, Larry Northcroft, resided together in an apartment in Wheeling. One afternoon in June 1999, the appellant, Mr. Northcroft, and other persons were gathered outside the apartment. Mr. Northcroft was drinking heavily, and apparently began engaging in conduct that the appellant found offensive. Prior to returning to their apartment, the appellant told other persons that she should kill Northcroft.

The appellant claimed that subsequent to their return to their apartment, Mr. Northcroft attempted to rape her. She claimed that she defended herself with a piece of electrical cord, which she wrapped around Mr. Northcroft's neck. The appellant testified that during her struggle with Northcroft, she pulled on the cord until Mr. Northcroft became still.

The appellant was convicted of first degree murder, with no recommendation of mercy. On appeal, the appellant asserted two grounds for appeal: (1) insufficiency of the evidence to prove first degree murder, and (2) possible juror bias.

JURY

Misconduct (continued)

State v. Vetromile (continued)

Syl. pt. 1 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 2 - "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

In determining that the jury could have concluded that the appellant had made an earlier determination to kill Northcroft, and had carried out the plan upon returning to their apartment, the Court noted several factors, including (1) the appellant's demeanor toward the victim; (2) the appellant's statement that she was going to kill the victim; (3) testimony from the medical examiner that the victim had apparently not attempted to defend himself or remove the cord from his neck; and (4) the appearance of the crime scene, which did not present evidence that any sort of struggle had occurred.

The Court addressed the appellant's claim of juror bias by noting the distinction between intrinsic and extrinsic jury improprieties. In this case, following the trial the appellant's attorney presented an affidavit from a local television reporter, who indicated that he had been contacted by a person who claimed to have been one of the jurors, and who explained that he/she had been aware during deliberations of inaccurate information regarding a "previous murder" allegedly committed by the appellant.

The Court noted that, given sufficient evidence and proof of misconduct, such intrinsic juror misconduct may result in the impeachment of a jury's verdict. In this case, however, the Court determined that the appellant had provided no evidence, such as the identity of the juror and whether the information was shared with the other jurors, to justify overturning the jury's verdict.

JURY

Misconduct (continued)

State v. Vetromile (continued)

Syl. pt. 3 - "A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." Syllabus Point 1, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

Syl. pt. 4 - "[A] jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process." Syllabus Point 2, in part, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

No error.

Peremptory strikes

Standards for exercise

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See JURY Exclusion of African-American in peremptory strikes, (p. 217) for discussion of topic.

Strike of African-American juror

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See JURY Exclusion of African-American in peremptory strikes, (p. 217) for discussion of topic.

Presence of alternate juror during deliberations

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

See SENTENCING Presentence investigation and report, When required, (p. 307) for discussion of topic.

JURY

Record of magistrate court jury trial

State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379 (2002) (Albright, J.) (Conviction Vacated and Remanded)

See APPEAL Record for appeal, (p. 37) for discussion of topic.

Rehabilitation of juror bias/prejudice

State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 218) for discussion of topic.

JURY TRIAL

Magistrate court

State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001) (McGraw, C.J.)
(Writ of Prohibition Granted)

The appellant was arrested on October 31, 1998 and charged in the Magistrate Court of Jefferson County with DUI and driving without a license. On the following day, the appellant was arraigned and signed a standard form indicating that he understood that if he desired a jury trial that it must be requested within twenty days of the arraignment.

The appellant did not request a jury trial until February 24, 1999, the day after he retained counsel. The magistrate denied the motion as untimely, and also subsequently denied a Motion for Reconsideration of Defendant's Request for Jury Trial. The appellant filed a writ of prohibition and/or mandamus with the circuit court, arguing that the magistrate had erred by failing to conduct a hearing under Rule 26(b) of the Rules of Criminal Procedure to determine if there was "unavoidable cause" excusing the appellant's untimely request. The circuit court denied relief.

The Court reversed this decision and remanded the matter. The Court concluded, in essence, that the right to a trial by jury was of such a fundamental nature that an appropriate record is necessary to determine if an untimely demand for a jury trial was the result of an intentional, knowing and voluntary waiver of the right. The Court stated that the magistrate court was obligated to provide the appellant with a hearing on the issue for the purpose of creation of an adequate record.

Syl. pt. 6 - "The procedures set forth in *W. Va. Code* § 50-5-8(b) (1994) and Rule 5(c) of the West Virginia Rules of Criminal Procedure for Magistrate Courts are sufficient to inform a magistrate that the right to a jury trial, as provided for in Article III, Section 14 and Article VIII, Section 10 of the West Virginia Constitution, has been voluntarily, knowingly, and intelligently waived, so that *W. Va. Code* § 50-5-8(b) and Rule 5(c) preserve a defendant's constitutional right to a jury trial." Syllabus, *State ex rel. Ring v. Boober*, 200 W.Va. 66, 69, 488 S.E.2d 66, 69 (1997).

Syl. pt. 7 - Where a criminal defendant triable in magistrate court fails to timely demand a jury trial within the twenty-day period provided by *W. Va. Code* § 50-5-8(b) (1994) and Rule 5(c) of the West Virginia Rules of Criminal Procedure for Magistrate Courts, but later seeks to exercise the constitutional right to a trial by jury citing unavoidable cause for the delay in making the request, the magistrate court is obligated to hold a hearing on the issue so as to permit the creation of an adequate record bearing upon whether the untimely demand resulted from an intentional, knowing and voluntary waiver of such right by the defendant.

JURY TRIAL

Right to hearing for untimely request

State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001) (McGraw, C.J.)
(Writ of Prohibition Granted)

See JURY TRIAL Magistrate court, (p. 232) for discussion of topic.

Right to impartial jury

State v. Varner, 212 W.Va. 532, 575 S.E.2d 142 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Pending criminal charges, (p. 222) for discussion of topic.

LESSER INCLUDED OFFENSE

Brandishing as lesser offense of wanton endangerment

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

The appellant was the manager of a tract of rural land in Jefferson County. In November of 1998, the appellant observed three hunters in the vicinity of the land. The appellant confronted these individuals and allegedly informed them that they were not permitted to hunt on the land in question, and that he would shoot them if they returned to the property. The appellant allegedly pointed a gun at the hunters and made racist remarks.

The appellant was indicted for three counts of wanton endangerment with a firearm and three counts of civil rights violations. Prior to deliberations, the appellant requested jury instructions on (1) brandishing a deadly weapon as a lesser-included offense of wanton endangerment, and (2) the right of a landowner or land manager to prohibit firearms on real property. The trial court refused to instruct the jury on each of these issues. The appellant was subsequently convicted of a single count of wanton endangerment.

The Court's primary focus was whether the trial court erred by not instructing the jury as to brandishing a deadly weapon as a lesser-included offense. The Court determined, after reviewing *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [overruled on other grounds in *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994)], and authority from Kentucky and Washington, that it would have been impossible for the appellant to commit the greater offense (wanton endangerment) without having first committed the lesser offense (brandishing). The Court accordingly held that brandishing was a lesser-included offense of wanton endangerment, and that it was an abuse of discretion for the trial court to refuse the instruction.

Syl. pt. 3 - "The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense.' *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982)." Syl. Pt. 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Syl. pt. 4 - "The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense." Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [overruled on other grounds, *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994)].' Syllabus Point 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982)." Syl. Pt. 5, *State v. Wright*, 200 W.Va. 549, 490 S.E.2d 636 (1997).

LESSER INCLUDED OFFENSE

Brandishing as lesser offense of wanton endangerment (continued)

State v. Bell (continued)

Syl. pt. 5 - The offense of brandishing as defined by West Virginia Code § 61-7-11 is a lesser included offense within the definition of wanton endangerment under West Virginia Code § 61-7-12.

Syl. pt. 6 - “ ‘ “In this jurisdiction where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when so requested.” Syllabus, Point 4, *State v. Hayes*, 136 W.Va. 199, [67 S.E.2d 9] [1951].’ Syl. Pt. 2, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).” Syl. Pt. 3, *State v. Miller*, 184 W.Va. 492, 401 S.E.2d 237 (1990).

The Court also held that it was error to refuse to instruct the jury as to the rights of a landowner under West Virginia Code § 61-7-14 to prohibit firearms on real property. The Court noted that while such an instruction would not have provided an excuse or justification for the appellant’s actions, it would have assisted the appellant in providing a lawful premise and context for his demand that other persons not carry firearms on the property.

Generally

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

Murder

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

LESSER INCLUDED OFFENSE

Possession with intent to deliver

State v. Gibson, 209 W.Va. 273, 546 S.E.2d 453 (2001) (Per Curiam) (Reversed and Remanded)

The defendant was convicted of felony offenses of possession with intent to deliver a controlled substance. The trial court refused to instruct the jury as to the lesser included misdemeanor offense of simple possession of a controlled substance. The Court found that possession with intent to deliver included all of the elements of simple possession, and that under the evidence adduced at trial, a jury could have found the defendant guilty of simple possession. The Court reversed the conviction and remanded the case for a new trial.

Syl. - "The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense." Syllabus Point 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Two-part test

State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002) (Albright, J.) (Conviction Reversed and Remanded for New Trial)

See LESSER INCLUDED OFFENSE Brandishing as lesser offense of wanton endangerment, (p. 234) for discussion of topic.

State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Photographs, (p. 144) for discussion of topic.

MAGISTRATE COURT

Appeal from

State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379 (2002) (Albright, J.) (Conviction Vacated and Remanded)

See APPEAL Record for appeal, (p. 37) for discussion of topic.

Jury trial

Obligation to conduct hearing upon denial

State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001) (McGraw, C.J.) (Writ of Prohibition Granted)

See JURY TRIAL Magistrate court, (p. 232) for discussion of topic.

Record of jury trial

State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379 (2002) (Albright, J.) (Conviction Vacated and Remanded)

See APPEAL Record for appeal, (p. 37) for discussion of topic.

Right to jury trial

State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001) (McGraw, C.J.) (Writ of Prohibition Granted)

See JURY TRIAL Magistrate court, (p. 232) for discussion of topic.

Right to trial

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

The respondent David Gregory was charged in magistrate court with a single felony count and six misdemeanor charges. After the respondent refused to waive the misdemeanor charges to the circuit court along with the felony charge, the state moved for dismissal of the misdemeanor charges. These charges were reinstated in a subsequent indictment.

MAGISTRATE COURT

Right to trial (continued)

State ex rel. Games-Neely v. Sanders (continued)

After the indictment, Gregory moved for severance and requested a remand of the misdemeanor charges for trial in magistrate court, citing the provisions of West Virginia Code § 50-5-7 and *State v. Bruffey*, 207 W.Va. 267, 531 S.E.2d 332 (2000). The circuit court initially denied this motion, but *sua sponte* reversed this decision and ordered that the misdemeanor cases be remanded. The prosecutor sought a writ of prohibition to prevent separate trials.

The Court denied the prosecutor's application for a writ of prohibition. The Court acknowledged the apparent conflict between the mandatory joinder provisions found in Rule 8(a) of the West Virginia Rules of Criminal Procedure and the incontrovertible right of a defendant, once a case is initiated in magistrate court, to have the case heard in that forum.

The solution adopted by the Court was to examine the charges under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1922), to determine whether the charges constituted the same act or transaction, thus requiring a single trial. The Court determined that since each of the statutory violations with which Gregory was charged required an element of proof that the other charges did not, it was clear that the legislature had intended to create separate offenses. Thus, there would be no double jeopardy violation if the charges were tried separately.

Syl. pt. 3 - "Rule 8(a) of the West Virginia Rules of Criminal Procedure compels the prosecuting attorney to charge in the same charging document all offenses based on the same act or transaction, or on two or more acts or transactions, connected together or constituting parts of a common scheme or plan, whether felonies, misdemeanors or both, provided that the offenses occurred in the same jurisdiction, and the prosecuting attorney knew or should have known of all the offenses, or had an opportunity to present all offenses prior to the time that jeopardy attaches in any one of the offenses." Syl. Pt. 3, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

Syl. pt. 4 - "The joinder of related offenses to meet possible variance in the evidence is not ordinarily subject to a severance motion. In those other situations where there has been either a joinder of separate offenses in the same indictment or the consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court." Syl. Pt. 6, *State v. Matter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

MAGISTRATE COURT

Right to trial (continued)

State ex rel. Games-Neely v. Sanders (continued)

Syl. pt. 5 - "A defendant's right to trial in magistrate court under West Virginia Code § 50-5-7 (1994) attaches when a criminal proceeding has been initiated in that forum. In situations where a plea of not guilty is entered in answer to a traffic or other citation, a criminal proceeding is initiated under the Rules of Criminal Procedure for the Magistrate Courts of West Virginia, not with the filing of the citation, but when a written and verified complaint has been filed and a finding of probable cause has been made by the magistrate." Syl. Pt. 6, *State v. Bruffey*, 207 W.Va. 267, 531 S.E.2d 332 (2000).

Syl. pt. 7 - The statutory right to trial in magistrate court granted by West Virginia Code § 50-5-7 (1976) (Repl. Vol. 2000) cannot be exercised if the misdemeanor trial in magistrate court would bar the felony trial in circuit court, based upon principles of double jeopardy.

Syl. pt. 8 - "A defendant shall be charged in the same indictment, in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are two or more acts or transactions connected together or constituting parts of a common scheme or plan." Syl. Pt. 1, *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980).

Syl. pt. 9 - West Virginia Code § 50-5-7 (1976) (Repl. Vol. 2000), granting the right to trial in magistrate court, is couched in terms of a right rather than simply a procedural norm. It is designed to grant a person first charged in magistrate court the right to maintain the action in magistrate court. In applying this statute, courts should attempt to provide the statute as much force and effect as possible without impinging upon established double jeopardy principles.

Syl. pt. 10 - "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syl. Pt. 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

Syl. pt. 11 - "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)." Syl. Pt. 4, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

MAGISTRATE COURT

Right to trial (continued)

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

In a case factually similar to *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002), the Court addressed the right of a defendant to have a case heard in magistrate court.

Hoosier was initially charged in magistrate court with three (3) counts of battery in connection with an incident outside a Wood County bar. The state moved to dismiss these charges, and subsequently indicted Hoosier in circuit court on one felony charge of malicious assault and two misdemeanor battery charges. Hoosier moved for severance of the battery charges, citing his right to a trial in magistrate court. The circuit court denied this motion, and Hoosier filed for a writ of prohibition.

The Court noted, as in *Neely, supra*, that while the state is obligated to join all offenses “based on the same act or transaction” in the same indictment, a defendant who has been initially charged in magistrate court may choose to exercise his statutory right under *W. Va. Code*, 50-5-7, to trial in magistrate court.

Syl. pt. 4 - “West Virginia Code § 50-5-7 (1976) (Repl. Vol. 2000), granting the right to trial in magistrate court, is couched in terms of a right rather than simply a procedural norm. It is designed to grant a person first charged in magistrate court the right to maintain the action in magistrate court. In applying this statute, courts should attempt to provide the statute as much force and effect as possible without impinging upon established double jeopardy principles.” Syllabus Point 9, *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002).

Rules of criminal procedure

Relationship between circuit court and magistrate court proceedings

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

MAGISTRATE COURT

When criminal proceedings initiated

Defects in citation voiding prosecution

State v. Gaskins, 210 W.Va. 580, 558 S.E.2d 579 (2001) (Albright, J.) (Conviction Vacated and Remanded)

See CHARGING DOCUMENT Citation in lieu of arrest, Defects in citation voiding prosecution, (p. 78) for discussion of topic.

MANDAMUS

Generally

State ex rel. Aaron M. v. DHHR, 212 W.Va. 323, 571 S.E.2d 142 (2001) (Per Curiam) (Writ Granted)

See ABUSE AND NEGLECT Payment of therapeutic services, (p. 13) for discussion of topic.

State ex rel. Bailey v. Rubenstein, Commissioner, ___ W.Va. ___, ___ S.E.2d ___ (No. 31148, June 19, 2003) (Per Curiam) (Writ of Mandamus Granted)

See SENTENCING “Good-time” credit, Generally, (p. 305) for discussion of topic.

State ex rel. Berry v. McBride, ___ W.Va. ___, ___ S.E.2d ___ (No. 30696, November 27, 2002) (Per Curiam) (Writ of Mandamus Granted)

See PRISON/JAIL CONDITIONS Right to single occupancy cell, (p. 269) for discussion of topic.

Payment of therapeutic services

State ex rel. Aaron M. v. DHHR, 212 W.Va. 323, 571 S.E.2d 142 (2001) (Per Curiam) (Writ Granted)

See ABUSE AND NEGLECT Payment of therapeutic services, (p. 13) for discussion of topic.

MENTAL HYGIENE PROCEDURES

Generally

State ex rel. Riley v. Rudloff, 212 W.Va. 767, 575 S.E.2d 377 (2002) (Davis, C.J.) (Writ of Prohibition)

See PRISON/JAIL CONDITIONS Right of inmate to mental health treatment, (p. 268) for discussion of topic.

Statute prohibiting application to inmates unconstitutional

State ex rel. Riley v. Rudloff, 212 W.Va. 767, 575 S.E.2d 377 (2002) (Davis, C.J.) (Writ of Prohibition)

See PRISON/JAIL CONDITIONS Right of inmate to mental health treatment, (p. 268) for discussion of topic.

MIRANDA WARNINGS

Test to determine whether prior warnings remain effective

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.)
(Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

Waiver of reading improper

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.)
(Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

MOOTNESS

Appellate review of technically moot issues

State ex rel. Shifflet v. Rudloff, ___ W.Va. ___, 582 S.E.2d 851 (No. 30968, May 8, 2003)
(Per Curiam)

See “TWO TERM” RULE Indictment, (p. 353) for discussion of topic.

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

Standards of addressing moot issues

State ex rel. Shifflet v. Rudloff, ___ W.Va. ___, 582 S.E.2d 851 (No. 30968, May 8, 2003)
(Per Curiam)

See “TWO TERM” RULE Indictment, (p. 353) for discussion of topic.

MULTIPLE OFFENSES

False swearing

Unit of prosecution

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

MURDER

Competency to stand trial

Morris v. Painter, 211 W.Va. 681, 567 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See COMPETENCY Procedures to determine, (p. 87) for discussion of topic.

Defendant's failure to express remorse

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Premeditation

Incorrect definition by prosecutor

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

Sufficiency of evidence

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

NEW TRIAL

Newly discovered evidence

State v. Trent, 209 W.Va. 338, 547 S.E.2d 276 (2001) (Per Curiam) (Affirmed)

In affirming the defendant's conviction for malicious endangerment and fleeing, the Court re-stated the rule in Syllabus Point 1 of *State v. Crouch*, 191 W.Va. 272, 445 S.E.2d 213 (1994), regarding newly discovered evidence, and concluded that the evidence the defendant claimed was newly discovered was not newly discovered, nor would it have made a significant difference at trial.

Syl. - "A new trial will not be granted on the ground of newly discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavits of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus Point 1, *State v. Crouch*, 191 W.Va. 272, 445 S.E.2d 213 (1994).

OBJECTIONS

Failure to object

State v. Adkins, 209 W.Va. 212, 544 S.E.2d 914 (2001) (Per Curiam) (Affirmed)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 282) for discussion of topic.

OBSTRUCTING AN OFFICER

Acts constituting obstruction

Failure to present identification not obstruction

State v. Srnsky, et. al., ___ W.Va. ___, 582 S.E.2d 859 (No. 30896, May 16, 2003) (Albright, J.) (Reversed)

Three brothers, David, Thomas and Brian Srnsky, were convicted in Tucker County for various misdemeanor offenses. Brian Srnsky was convicted of obstructing an officer; David Srnsky was convicted of trespassing on property other than a structure or conveyance; and Thomas Srnsky was convicted of trespassing on property other than a structure or conveyance and two counts of destruction of property by the removal of posted signs.

The charges against the appellants stemmed from a property dispute with an adjacent landowner. On February 24, 2001, David and Thomas Srnsky traveled to a home to speak with one of the owners of the adjacent tract regarding the purchase of a right of way. While the facts were somewhat disputed, it appears that the discussion between the parties occurred in the porch and yard areas of the home, and that repeated requests were made by the property owner for the brothers to leave the area. Warrants were subsequently issued against the brothers for this incident.

The State Police also obtained warrants for an unrelated incident involving one of the other property owners. In attempting to serve these warrants, police officers walked onto the property owned by the Srnsky's on March 2, 2001 and approached four men who were walking on the property. One of the men, later identified as Brian Srnsky, refused to respond to the officers when asked to identify himself, and was arrested for obstructing an officer. At the same time, a pat-down search of one of the other men, later identified as Thomas Srnsky, revealed two "No Trespassing/ No Hunting" signs with the name of the adjacent property owner written thereon.

In a joint appeal, each of the appellants claimed that there was insufficient evidence to support their individual convictions. The Court discussed the convictions as they related to the three specific offenses of which the appellants were convicted.

In regard to Thomas Srnsky's convictions for destruction of property by the removal of posted signs, the Court noted that the State had conceded that the trial evidence was insufficient to sustain the convictions. The basis for the Court's determination of error (and the State's concession) was that the State had failed to prove an essential element of the offense, i.e., that the property on which the signs were posted was owned by someone other than the person charged with the offense.

Syllabus Point 2 - An essential element of the offense of removing "posted" signs pursuant to West Virginia Code § 20-2-10 (1961) (Repl. Vol. 2002) is proof that the property on which the signs were posted is owned by someone other than the person charged with the offense of removing or damaging the signs.

OBSTRUCTING AN OFFICER

Acts constituting obstruction (continued)

Failure to present identification not obstruction (continued)

State v. Srnsky, et. al. (continued)

In addressing the convictions of Thomas and David Srnsky for trespassing on property other than a structure or conveyance, the Court agreed with the appellants that the evidence was insufficient to support the convictions for that particular offense. Specifically, the Court noted that the brothers had previously been guests on the property, and that the “No Trespassing” signs erected by the complainant were in fact erected on property which did not belong to the complainant. The Court stated that while the brothers could have been charged with trespass in or upon a structure or conveyance, based on the brothers’ porch/curtilage conversation, the State had made no effort to amend the charging document. Thus, because there was no evidence presented that the brothers had trespassed on property other than a structure, the Court reversed the convictions.

Finally, the Court addressed the conviction of Brian Srnsky for obstructing an officer. The Court first rejected the assertion by the State that the “totality of the circumstances”, including allegations that the appellant had attempted to leave the area and had verbally threatened the officers, supported the conviction. The Court focused instead on the issue of whether the refusal by the appellant to give his name to the police officer, standing alone, constituted obstructing an officer.

The Court held that refusing to give one’s name to a police officer, standing alone, does not constitute obstruction. The Court stated, “[t]he evidence in the case before us does not establish that Brian unlawfully interfered with the officers carrying out their duties since he was not under arrest at the time he was questioned and he was not informed by the officers that they had a warrant for his arrest or the basis on which the warrants they had were issued. Moreover, if mere questioning of an officer does not constitute unlawful obstruction, it stands to reason that silence alone cannot establish the offense.

Syllabus Point 4 - Refusal to identify oneself to a law enforcement officer does not, standing alone, form the basis for a charge of obstructing a law enforcement officer in performing official duties in violation of West Virginia Code § 61-5-17(a) (2001) (2002 Supp.). However, the charge of obstructing an officer may be substantiated when a citizen does not supply identification when required to do so by express statutory direction or when the refusal occurs after a law enforcement officer has communicated the reason why the citizen's name is being sought in relation to the officer's official duties.

The Court stressed that this ruling, “presents no obstacle to a well-trained law enforcement officer engaging in the performance of his duties”, noting that “[a]ny communication by an officer as to the reason why the name of the citizen who is approached is needed, such as providing the name of the person appearing on an arrest warrant the officer is attempting to execute and/or otherwise disclosing the need for the investigation, may well be sufficient to support an obstruction charge.”

OBSTRUCTING AN OFFICER

What constitutes obstruction

Standards

State v. Srnsky, et. al., ___ W.Va. ___, 582 S.E.2d 859 (No. 30896, May 16, 2003) (Albright, J.) (Reversed)

See OBSTRUCTING AN OFFICER What constitutes obstruction, Failure to identify not obstruction, (p. 250) for discussion of topic.

OFFENSES

False swearing

Unit of prosecution

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

PAROLE

Agreements

State ex rel. Gardner v. West Virginia Div. of Corrections, 210 W.Va. 783, 559 S.E.2d 929 (2002) (Davis, C.J.) (Writ Granted as Moulded)

The petitioner was charged in 1995 with burglary in Cabell County, West Virginia. After serving part of his sentence, the petitioner was granted parole in 1998. In September 2000, he was arrested and charged with three misdemeanor offenses. Based on this arrest, the Parole Board filed parole violation charges.

At the final parole violation hearing, the petitioner and the Parole Board entered into an agreement that if the petitioner committed no further violations during a subsequent 30-day period (December 21, 2000 to January 21, 2001), he would be reinstated to parole. During this period, the petitioner committed no new violations of the conditions of his parole. However, on January 18, 2001, the petitioner entered pleas of guilty to the September 2000 misdemeanors which served as the basis for the initial parole violation filing. Based upon these convictions, the Parole Board charged the petitioner with violating his parole, and subsequently revoked his parole on May 7, 2001. The petitioner sought a writ of habeas corpus with the Supreme Court of Appeals, arguing that he had fulfilled the conditional agreement with the Parole Board.

The Court agreed with the petitioner. In reviewing the agreement between the petitioner and the Parole Board, the Court applied the standards applicable in reviewing plea agreements. The Court noted the “enforceable rights” which inure to both parties to such agreements, and the due process concerns which arise in the process of enforcing plea agreements.

Syl. pt. 1 - “The West Virginia [Parole] Board . . . must act in a way which is not unreasonable, capricious, or arbitrary.” Syllabus point 3, *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996).

Syl. pt. 2 - Principles of law developed in relation to plea agreements between the state and a criminal defendant apply with equal force to written conditional agreements entered between the West Virginia Parole Board and a parolee.

The Court brushed aside the State’s “implausible” arguments that the convictions were essentially new violations, and held that the petitioner was entitled to specific performance of the agreement that he had made with the Parole Board.

Hearings

Requirement for full review by parole board

State ex rel. Patton v. Rubenstein, ___ W.Va. ___, 582 S.E.2d 743 (No. 30967, February 28, 2003) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Standard for revocation, (p. 257) for discussion of topic.

PAROLE

Hearings (continued)

Time for review

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

The petitioner was convicted in 1987 of first degree murder and sentenced to life imprisonment. He received his first parole hearing in July 2000. Following the hearing, he was denied parole, and the Parole Board determined that the petitioner would receive his next parole hearing in June 2002.

The petitioner filed for a writ of habeas corpus, claiming (1) that the Parole Board had acted in an arbitrary and capricious manner by focusing upon the his previous criminal activity in denying parole, and (2) that the Parole Board violated *State ex rel. Carper v. W.Va. Parole Board*, 203 W.Va. 583, 509 S.E.2d 864 (1998), by not making specific findings as to why the petitioner was denied annual parole review.

Syl. pt. 1 - "The decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia [Parole Board]. However, such a decision shall be reviewed by this Court to determine if the [Parole Board] abused its discretion by acting in an arbitrary and capricious fashion." Syllabus point 3, *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981).

Syl. pt. 2 - "The Board of Parole may only extend the period between parole review hearings . . . beyond 1 year [for prisoners whose offenses occurred at a time when the law prescribed annual parole reviews] if the Board has made a case-specific individualized determination with reasoned findings on the record showing why there will be no detriment or disadvantage to the prisoner from such an extension. Additionally, due process requires that such a prisoner receiving a review period of more than 1 year must be afforded the opportunity to submit information for the Board's consideration during any extended period requesting that a review be granted before the expiration of the extended period." Syllabus point 3, in part, *State ex rel. Carper v. West Virginia Parole Bd.*, 203 W.Va. 583, 509 S.E.2d 864 (1998).

The Court determined that the Parole Board did not act in an arbitrary and capricious manner. The Court noted that the Board had complied with the factors enumerated in West Virginia Code, § 62-12-13(i)(1), which lists a variety of elements to be considered by the Board in determining whether to grant parole to an inmate. The Court noted that the decision of the Parole Board indicated that it had considered four factors in denying parole: (1) the circumstances of the crime, (2) the petitioner's prior convictions, (3) the community/public sentiment, and (4) official/judicial sentiment.

PAROLE

Hearings (continued)

Time for review (continued)

State ex rel. Stollings v. Haines (continued)

The Court also held that, despite being “technically moot” because of the petitioner’s imminent parole hearing, the petitioner was correct in asserting that the Board had violated the provisions of *Carper*. The Court noted that the record contained no stated reason as to why the Parole Board had refused to consider the petitioner for parole for a period of two years. The Court declined to fashion a remedy for this violation (again citing the imminency of the petitioner’s second parole hearing in June 2002), but cautioned the Board to follow the specific requirements of *Carper*.

Reference to eligibility by prosecutor

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

Standard for granting

State ex rel. Stollings v. Haines, 212 W.Va. 45, 569 S.E.2d 121 (2002) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Hearings, Time for review, (p. 255) for discussion of topic.

Standard of review

State ex rel. Gardner v. West Virginia Div. of Corrections, 210 W.Va. 783, 559 S.E.2d 929 (2002) (Davis, C.J.) (Writ Granted as Moulded)

See PAROLE Agreements, (p. 254) for discussion of topic.

State ex rel. Patton v. Rubenstein, ___ W.Va. ___, 582 S.E.2d 743 (No. 30967, February 28, 2003) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Standard for revocation, (p. 257) for discussion of topic.

PAROLE

Standard for revocation

State ex rel. Patton v. Rubenstein, ___ W.Va. ___, 582 S.E.2d 743 (No. 30967, February 28, 2003) (Per Curiam) (Writ of Habeas Corpus Denied)

The petitioner was paroled after serving 7 ½ years of a thirty-year sentence for aggravated robbery. After having been on parole for six months, the petitioner's parole officer filed a petition to revoke the petitioner's parole. Among the allegations included in the petition were (1) that the petitioner had violated his curfew; (2) that the petitioner had driven an automobile while his license was suspended; and (3) that the petitioner had possessed alcoholic beverages.

At his final parole violation hearing, the petitioner offered mitigating evidence on each of these charges. The petitioner testified that his curfew violation was related to his employment and submitted a letter from his employer attesting to this fact. The petitioner also testified that while he had indeed driven on a suspended license, that he had done so at the request of a customer at the towing business at which he was employed. The petitioner also testified that he had indeed purchased a case of beer, but that he had not consumed the beer and had bought it at the request of an acquaintance.

Following the hearing, the Parole Board voted to revoke the petitioner's parole. The petitioner filed for a writ of habeas corpus, alleging (1) that the Board acted arbitrarily and capriciously in revoking his parole in light of the mitigating circumstances and in failing to consider less restrictive alternatives, and (2) that the Board had violated *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996), in that all members of the Board had failed to consider the entire record of the parole revocation hearing prior to a revocation determination.

Syllabus Point 1 - "The decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia [Parole Board]. However, such a decision shall be reviewed by this Court to determine if the [Parole Board] abused its discretion by acting in an arbitrary and capricious fashion." Syl. Pt. 3, *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981).

Syllabus Point 2 - "The West Virginia [Parole Board] must obey legislation and must act in a way which is not unreasonable, capricious, or arbitrary." Syl. Pt. 3, *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996).

PAROLE

Standard for revocation (continued)

State ex rel. Patton v. Rubenstein (continued)

Syllabus Point 3 - “The record in parole revocation cases must affirmatively show that the documents and evidence produced in the revocation proceeding have been submitted to all duly appointed and qualified members of the West Virginia Board of Probation and Parole for consideration prior to the final decision, that the number of members considering such documents and evidence constituted a quorum for conduct of business by the Parole Board, and that a majority of the duly appointed and qualified members considering the documents and evidence must concur in any order revoking parole, either by signing the order or filing with the secretary of the Parole Board a written concurrence in such revocation, which may be then so certified by the chairman of the Parole Board, the secretary of the Parole Board, or a member of the Parole Board assigned to conduct the proceeding.”

Syl. Pt. 2, *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996). The Court determined that the parole Board had not acted arbitrarily and capriciously in revoking the petitioner’s parole. The Court noted that the petitioner had not denied any of the admittedly technical parole violations. The Court noted the petitioner’s contention that the mitigating circumstances of each of the violations should have persuaded the Board to adopt a less restrictive sanction than total revocation of his parole. The Court observed that the Board had found, and that the petitioner had admitted during his hearing, that electronic home monitoring would not be a feasible alternative. The Court thus determined that the Board had not abused its discretion in revoking the petitioner’s parole.

The Court also determined that the petitioner had failed to prove that all members of the Parole Board had not adequately reviewed the evidence as required in *Eads*. The petitioner asserted that the poor quality of the audiotape of the final hearing prohibited full review of the hearing by those members not in attendance. The Court brushed aside this contention, holding that the evidence indicated that the petitioner’s case was presented to the other members of the Board in conference, that a full discussion was held, and that the Board rendered a conclusion as an entire Board.

Writ of Habeas Corpus Denied.

Less restrictive alternatives

State ex rel. Patton v. Rubenstein, ___ W.Va. ___, 582 S.E.2d 743 (No. 30967, February 28, 2003) (Per Curiam) (Writ of Habeas Corpus Denied)

See PAROLE Standard for revocation, (p. 257) for discussion of topic.

PENAL STATUTES

Desuetude

State ex rel. Canterbury v. Blake, ___ W.Va. ___, ___ S.E.2d ___ (No. 31150, June 23, 2003) (Per Curiam) (Writ of Prohibition Granted)

See DESUETUDE What constitutes, (p. 110) for discussion of topic.

PLAIN ERROR

Defined

State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002) (Per Curiam) (Reversed and Remanded)

See DOUBLE JEOPARDY Multiple punishment, (p. 120) for discussion of topic.

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

Forfeiture of right and waiver of error distinguished

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

Presence of alternate juror during deliberations

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

See SENTENCING Presentence investigation and report, When required, (p. 307) for discussion of topic.

Sua sponte recognition of

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

PLEA AGREEMENT

Acceptance of

State ex rel. Farmer v. Trent, 209 W.Va. 789, 551 S.E.2d 711 (2001) (McGraw, J.) (Affirmed)

See PLEA AGREEMENT Factual basis, (p. 262) for discussion of topic.

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

Admissibility of

Generally

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Standard of review

State v. Swims, 212 W.Va. 263, 569 S.E.2d 784 (2002) (Davis, C.J.) (Conviction Reversed)

See EVIDENCE Plea agreements of co-defendants, (p. 155) for discussion of topic.

Agreement with parole board

State ex rel. Gardner v. West Virginia Div. of Corrections, 210 W.Va. 783, 559 S.E.2d 929 (2002) (Davis, C.J.) (Writ Granted as Moulded)

See PAROLE Agreements, (p. 254) for discussion of topic.

Enforceability

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

PLEA AGREEMENT

Factual basis

State ex rel. Farmer v. Trent, 209 W.Va. 789, 551 S.E.2d 711 (2001) (McGraw, J.) (Affirmed)

In this habeas corpus action, the petitioner appealed the circuit court's refusal to grant habeas corpus relief. The two primary grounds asserted by the petitioner for relief were (1) that the trial court had not properly advised him of his constitutional rights at the time of his plea, as required by Rule 11(c) of the Rules of Criminal Procedure, and (2) that the trial court had failed to obtain a sufficient factual basis from the petitioner at the time of the plea, as required by Rule 11 (f).

The Court denied relief on both arguments. On the first issue, the court noted that the petitioner had refused to allow his trial counsel to testify at the habeas hearing. The circuit court's response to this assertion of attorney-client privilege had been to advise the petitioner that the court would therefore not accept testimony from the petitioner on the issue of the plea colloquy, thus establishing that the issue of "voluntariness" could only be determined from the record.

The Court then declined to extend habeas relief to the petitioner for the Rule 11(f) "factual basis" issue, finding that the requirement was not of a constitutional nature.

Syl. pt. 2 - Absent the special circumstances of a defendant claiming factual innocence while pleading guilty to a criminal charge, the requirement of *W. Va. R. Crim.P.* 11(f) that a trial court make an inquiry into the factual basis of the defendant's plea is not constitutionally mandated. It therefore follows under our reasoning in syllabus point 10 of *State ex rel. Vernatter v. Warden*, 207 W.Va. 11, 528 S.E.2d 207 (1999), that a simple violation of Rule 11(f), standing alone and without a showing of prejudice, may not serve as a predicate for collateral relief under the West Virginia Post-Conviction Habeas Corpus Act, *W. Va. Code* §§ 53-4A-1 to -11.

Guilty plea withdrawal

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

Ineffective assistance of counsel

Hatfield v. State, 209 W.Va. 292, 546 S.E.2d 774 (2001) (Per Curiam) (Denial of Habeas Corpus Affirmed)

See HABEAS CORPUS Plea agreement, (p. 179) for discussion of topic.

PLEA AGREEMENT

Judges

Duty to advise of recidivist possibility

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

Participation in plea discussions

State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001) (Per Curiam) (Vacated and Remanded)

See COMPETENCY Evaluation prior to trial, (p. 85) for discussion of topic.

Knowing and voluntary

State v. Taylor, ___ W.Va. ___, 568 S.E.2d 50 (2002) (Per Curiam) (Affirmed in Part, Reversed in part, and Remanded)

See *EX POST FACTO* Amended recidivist statute as violating, (p. 168) for discussion of topic.

Standard for enforcement

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

Recidivist proceedings

State v. Taylor, ___ W.Va. ___, 568 S.E.2d 50 (2002) (Per Curiam) (Affirmed in Part, Reversed in part, and Remanded)

See *EX POST FACTO* Amended recidivist statute as violating, (p. 168) for discussion of topic.

PLEA AGREEMENT

Validity

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

The petitioner was indicted for numerous charges in a September 2001 indictment. The petitioner sought a writ of prohibition to prohibit the circuit court from reinstating a number of criminal charges that had been dismissed with prejudice as part of a plea agreement.

The charges had been dismissed pursuant to a plea agreement wherein the petitioner had pleaded guilty to being a felon in possession of a firearm under West Virginia Code, § 61-7-7(b)(2). At the time of the entry of the plea, both the petitioner and the State were under the mistaken belief that the offenses to which the petitioner was pleading guilty were classified as felony offenses. However, after the entry of the plea, the court discovered that the offenses to which the petitioner had entered his plea were, at the time they were committed, classified as misdemeanor offenses. Consequently, the court determined that the petitioner could not have been charged with felonies in connection with these two offenses, declared the plea agreement invalid and unenforceable, and reinstated the remaining charges in the indictment.

The petitioner sought to prohibit reinstatement of the dismissed charges, arguing that the portion of the plea agreement requiring dismissal of the charges was binding upon the state, and that to permit reinstatement of the charges would violate principles of double jeopardy.

The Court disagreed with the petitioner's contentions and denied his request to prohibit reinstatement of the charges. The Court noted that dismissal of the charges was an "integral part" of the plea agreement, and was "inextricably intertwined" with the other portion of the agreement, *i.e.*, the petitioner's guilty plea. The Court ruled that since a portion of the plea agreement was a legal impossibility and could not be discharged, the entire agreement must be set aside. The Court determined that the plea agreement must be vacated in its entirety and the parties placed in the positions that they had occupied prior to the entry of the agreement.

Syllabus Point 1-“ ‘A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code*, 53-1-1.” Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).’ Syl. pt. 2, *State ex rel. Kees v. Sanders*, 192 W.Va. 602, 453 S.E.2d 436 (1994).” Syl. Pt. 1, *State ex rel. United Hosp. Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997).

PLEA AGREEMENT

Validity (continued)

State ex rel. Gessler v. Mazzone (continued)

Syllabus Point 2- “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12(1996).

Syllabus Point 4- “A recognized corollary to the principle that a guilty plea must be shown to have been intelligently and voluntarily entered is the rule that if the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand.” Syl. Pt. 1, *State ex rel. Morris v. Mohn*, 165 W.Va. 145, 267 S.E.2d 443 (1980).

Syllabus Point 6-“The entry of a *nolo contendere* or a guilty plea pursuant to a plea bargain and the oral pronouncement of a sentence by a circuit court does not impose a double jeopardy bar where the defendant has not served any portion of the sentence.” Syl. Pt. 13, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

Writ of Prohibition Denied.

Violation of

Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002) (Per Curiam) (Affirmed)

See HABEAS CORPUS Plea agreement, Violation of, (p. 180) for discussion of topic.

POLYGRAPH EXAMINATION

Miranda rights

Presence of counsel irrelevant

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.)
(Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

Required prior to examination

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.)
(Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

PRE-INDICTMENT DELAY

“Three term” rule

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

PRISON/JAIL CONDITIONS

Application of Americans with Disabilities Act

State ex rel. Berry v. McBride, ___ W.Va. ___, ___ S.E.2d ___ (No. 30696, November 27, 2002) (Per Curiam) (Writ of Mandamus Granted)

See PRISON/JAIL CONDITIONS Right to single occupancy cell, (p. 269) for discussion of topic.

Inmates confined to wheelchairs

State ex rel. Berry v. McBride, ___ W.Va. ___, ___ S.E.2d ___ (No. 30696, November 27, 2002) (Per Curiam) (Writ of Mandamus Granted)

See PRISON/JAIL CONDITIONS Right to single occupancy cell, (p. 269) for discussion of topic.

Right of inmate to mental health treatment

State ex rel. Riley v. Rudloff, 212 W.Va. 767, 575 S.E.2d 377 (2002) (Davis, C.J.) (Writ of Prohibition Granted)

The petitioner, Jesse Riley, is a diagnosed paranoid schizophrenic. Following his arrest for domestic battery and obstructing an officer, his mother attempted to file a mental hygiene petition to have Mr. Riley placed in an appropriate mental health facility. Her request was denied, as was the request of officials at the Eastern Regional Jail, who also observed Mr. Riley's behavior during his incarceration. The basis for these denials was that *W. Va. Code*, § 27-5-2(a) (2002) (Supp. 2002), prohibited persons who were incarcerated at the time of the filing of the application, from being subject to the involuntary hospitalization procedures.

The petitioner asserted that *W. Va. Code*, § 27-5-2(a) was unconstitutional in that it violated his right to due process of law by preventing him from receiving necessary medical treatment for his severe mental illness.

Syllabus Point 2 - "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond all reasonable doubt." Syllabus Point 1, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965)." Syllabus point 4, *McCoy v. Vankirk*, 201 W.Va. 718, 500 S.E.2d 534 (1997).

PRISON/JAIL CONDITIONS

Right of inmate to mental health treatment (continued)

State ex rel. Riley v. Rudloff (continued)

The Court first observed that the petitioner's complaint amounted to a challenge of conditions of his confinement, thus necessitating application of the test set forth in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed. 2d 447 (1979). In *Bell*, the United States Supreme Court determined that the key issue in determining whether pretrial conditions constitute a deprivation of due process is whether such conditions amount to a "punishment" of the detainee. *Bell* further noted that this question centered on the issue of whether a particular condition "is reasonable related to a legitimate governmental objective."

Applying the *Bell* test, the Court determined that § 27-5-2(a) did not bear a rational relationship to a legitimate governmental purpose. The Court noted that the only stated governmental objectives underlying § 27-5-2(a) were to combat overcrowding at mental health facilities and to prevent the potential misuse of mental hygiene proceedings "under doubtful circumstances." The Court observed (1) that permitting an application for involuntary hospitalization does not automatically mandate hospitalization, but rather passes the matter on for further evaluation, and (2) that the overcrowding issue was non-persuasive, given the relatively low number of requests for transfer to psychiatric facilities.

Finally, the Court pointed out the "special relationship" that exists between the State and a person taken into custody, which gives rise to a duty upon the State to assume responsibility for that person's welfare.

Syllabus Point 3 - Insofar as the "incarcerated persons" language of *W. Va. Code* § 27-5-2(a) (2002) (Supp. 2002) operates to wholly exclude pretrial detainees in state custody from participating in the application process for involuntary hospitalization, it is unconstitutional as it violates the due process right of such detainees to receive medical care.

Writ of Prohibition Granted.

Right to single occupancy cell

State ex rel. Berry v. McBride, ___ W.Va. ___, ___ S.E.2d ___ (No. 30696, November 27, 2002) (Per Curiam) (Writ of Mandamus Granted)

The petitioner, an inmate at Mount Olive Correctional Center, is required to utilize a wheelchair to move about the facility. Although the petitioner generally is the sole occupant of his cell, prison officials have indicated that they may be required to house a second inmate in the cell.

The petitioner filed a petition for mandamus, alleging that he had a right to be housed in a cell without another inmate solely because he is confined to a wheelchair.

PRISON/JAIL CONDITIONS

Right to single occupancy cell (continued)

State ex rel. Berry v. McBride (continued)

Syllabus - "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

The Court determined that the petitioner did not have a specific constitutional right, or a right under the Americans with Disabilities Act, 42 U.S.C.A. § 12101 *et. seq.* (1990), to a single-occupancy cell.

However, the Court noted that under C.S.R. § 95-2-8.6, if a cell or room is designated for single-occupancy, the Warden is prohibited from placing more than one inmate in such cell. Since the petitioner had alleged that his cell was designed for single occupancy, and since the Warden had failed to affirm or deny this fact, the allegation was taken as true. Thus, the Court determined that the Warden had no discretion to place another inmate in the petitioner's single occupancy cell.

Writ of Mandamus Granted.

PRIVILEGES

Marital confidence privilege

Generally

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

Mr. Bohon entered into a conditional guilty plea whereby he pleaded guilty to second degree murder and reserved the right to appeal certain pretrial rulings by the trial court. Specifically, the appellant contested the trial court's denial of his motion *in limine* to prohibit the introduction, at trial, of (1) the trial testimony of a co-defendant at the co-defendant's earlier trial, and (2) certain statements made by the appellant to his wife.

The co-defendant, Roy Helmick, was tried prior to the appellant and gave testimony incriminating the appellant in the homicide. Prior to the appellant's trial, Helmick indicated that he would not testify and that he would assert his right against self-incrimination if called as a witness. The state proposed using Helmick's trial testimony in lieu of his live testimony. The trial court denied the appellant's motion to prohibit the use of this testimony.

The Court reversed the conviction on this ground. The Court noted the holding of *State ex rel. Grob v. Blair*, 158 W.Va. 642, 214 S.E.2d 330 (1975), regarding the importance of meaningful cross-examination in the context of the right of confrontation. The Court also noted the State's confession of error on this issue.

Syl. pt. 2 - "The fundamental right to confront one's accusers, which contemplates the opportunity of meaningful cross-examination, is guaranteed by Article III, Section 14 of the West Virginia Constitution." Syllabus Point 1, *State ex rel. Grob v. Blair*, 158 W.Va. 642, 214 S.E.2d 330 (1975).

The Court also discussed the trial court's denial of the appellant's motion to prohibit the state from introducing certain statements made by the appellant to his wife. The statements were made in the couple's automobile in the presence of the couple's eight-month old child, and were subsequently repeated by the appellant and his wife to third persons. The trial court ruled that the appellant had waived the spousal confidence privilege of *W. Va. Code*, § 57-3-4, by making the statements in the presence of a third person and by each parties' repetition of the statements to third persons.

The Court believed otherwise. On the issue of the confidentiality of the statements made in the presence of a third person, the Court held, in with *Nash v. Fidelity-Phoenix Life Insurance Company*, 106 W.Va. 672, 146 S.E. 726 (1929), that for confidentiality of a marital communication to be waived, the communication must be made in the presence of a "comprehending" third part, *i.e.*, a party capable of understanding the communication. The Court noted that ordinary reason, as well as expert testimony presented at the pretrial hearing, indicated that an eight-month old child was not a "comprehending" party, and thus the appellant did not waive the confidentiality of the communication.

PRIVILEGES

Marital confidence privilege (continued)

Generally (continued)

State v. Bohon (continued)

The Court also found error in the trial court's holding that the appellant's statements to his wife were not confidential due to the subsequent repetition of these statement to third persons. The Court held that the subsequent communication to a third party of a statement of a statement originally made in the context of a marital communication does not act to destroy the original marital confidence privilege. The Court did note, however, that while the spouse could not be compelled to testify to these statements, the third parties to whom the statements were made could testify, assuming that the statements were otherwise admissible.

Syl. pt. 3 - The test for determining whether acts or conduct of a spouse constitute confidential communication for the purposes of the marital confidence privilege is whether the act or conduct was induced by, or done in reliance on, the confidence of the marital relation, *i.e.*, whether there was an expectation of confidentiality.

Syl. pt. 4 - For a spousal communication made in the presence of a third party not to be considered confidential, and thus not privileged under the marital confidence privilege, the third party must be a comprehending third party, that is, a party capable of understanding the communication.

Syl. pt. 5 - Only the accused can waive the marital confidence privilege during a criminal prosecution.

Who may assert or waive

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

PROBABLE CAUSE

Requirement for initiation of criminal proceeding

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

PROBATION

Credit for jail time

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

Jail imposed as a condition of

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

The appellant was charged with leaving the scene of an accident resulting in death. Bail was initially set in the amount of \$150,000, and was subsequently reduced to \$75,000. Despite the bail reduction, the appellant remained incarcerated.

The appellant pleaded guilty to the charge on January 2, 2001. Following his plea, the trial court reduced the appellants bail to \$20,000 and the appellant was released from custody, having served 119 days in jail prior to that time. At the sentencing hearing on March 30, 2001, the trial court suspended imposition of sentence and placed the appellant on probation for a period of three years, with a specific condition that the appellant serve six months in jail. The trial court refused, however, to give the appellant credit for the time served prior to his plea, reasoning that the appellant was not entitled to such deductions because he had not received a specific sentence.

The Court reversed this decision. Noting the language of *W.Va. Code*, 62-12-9(b)(4), the Court discussed the distinction between the imposition of jail as a condition of probation for offenses with a minimum or indeterminate sentence, and other types of statutory penalties. Under the former, jail could be imposed for a period equal to the lesser of one-third of the express minimum or indeterminate sentence or six months. Under all other types of statutory penalties, the trial court could impose a maximum period of six months.

The Court also noted the general rule regarding credit for time served in jail, as cited in *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978), and stated that the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution required that the appellant receive credit for the pretrial detention period.

Syl. pt. 3 - "Ambiguous penal statutes must be strictly construed against the state and in favor of the defendant." Syl. Pt. 1, *Myers v. Murensky*, 162 W.Va. 5, 245 S.E.2d 920 (1978).

PROBATION

Jail imposed as a condition of (continued)

State v. McClain (continued)

Syl. pt. 4 - The legislative intent reflected in the provisions of West Virginia Code 62-12-9 (b)(4) (1994) (Repl. Vol. 2000) is to establish a six-month limit for the period of incarceration which may be imposed as a condition of probation. When a minimum or indeterminate sentence is involved, then the maximum term of incarceration as a condition of probation is one-third of the express minimum or indeterminate sentence or six months, whichever is less; for all other types of statutory penalties, the maximum term of incarceration as a condition of probation is six months.

Syl. pt. 5 - "The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable." Syl. Pt. 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978).

Syl. pt. 6 - The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable.

Terms of

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

PROHIBITION

Abuse and neglect

State ex rel. Rose L. et al. v. Pancake, 209 W.Va. 188, 544 S.E.2d 403 (2001) (Starcher, J.) (Writ of Prohibition Denied)

See ABUSE AND NEGLECT Agreement relinquishing parental rights, Hearing on motion to set aside, (p. 3) for discussion of topic.

Factors for issuance of writ

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

Generally

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

Grounds for

State ex rel. Canterbury v. Blake, ___ W.Va. ___, ___ S.E.2d ___ (No. 31150, June 23, 2003) (Per Curiam) (Writ of Prohibition Granted)

See DESUETUDE What constitutes, (p. 110) for discussion of topic.

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

PROHIBITION

Grounds for (continued)

State ex rel. Sutton v. Mazzone, 210 W.Va. 331, 557 S.E.2d 385 (2001) (Per Curiam) (Writ of Prohibition Granted)

See DISCOVERY Witness list, (p. 115) for discussion of topic.

Standard for relief

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

Standard of review

State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (2002) (Per Curiam) (Writ of Prohibition Denied)

See PLEA AGREEMENT Validity, (p. 264) for discussion of topic.

Use to correct jurisdictional defects

State ex rel. Myers v. Painter, ___ W.Va. ___, 576 S.E.2d 277 (No. 30514, December 6, 2002) (Per Curiam) (Reversed and Remanded)

See ATTORNEYS Ineffective assistance of counsel, Generally, (p. 64) for discussion of topic.

When issued on behalf of state

State ex rel. Clifford v. Stucky, 212 W.Va. 599, 575 S.E.2d 209 (2002) (Albright, J.) (Writ of Prohibition Granted)

See COMPLAINTS Sufficiency of, (p. 91) for discussion of topic.

PROMPT PRESENTMENT RULE

“Fruit-of-the-Poisonous-Tree” Application

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.) (Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

Generally

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.) (Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

Remedy for violation

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.) (Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

Statements obtained in violation of

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.) (Reversed and Remanded)

The appellant was charged with first-degree murder in connection with the death of Paul Rollins on August 31, 1999 in Ritchie County. The appellant was arrested at a home in Cabell County at 4:00 a.m. on September 2, 1999 and transported to the Cabell County Jail to await transportation to Ritchie County. The appellant did not appear before a magistrate in Cabell County. While at the Cabell County Jail, the appellant was given Miranda warnings, and provided the authorities with a statement denying his involvement in the death of Mr. Rollins.

At 5:00 p.m. that same date, the appellant was transported from the Cabell County Jail to Ritchie County. He was given his Miranda warnings at the time he left the jail and when he arrived in Ritchie County at 8:00 p.m. . After his arrival in Ritchie County, the appellant gave a statement indicating his involvement in Mr. Rollins death. The appellant was not taken before a magistrate until 10:45 a.m. on September 3, 1999.

PROMPT PRESENTMENT RULE

Statements obtained in violation of (continued)

State v. DeWeese (continued)

Several days later, on September 9, 1999 and while still in custody, the appellant submitted to two separate polygraph examinations. The appellant was not provided Miranda warnings at this time, his counsel having indicated to the police that such warnings would not be necessary.

The appellant was subsequently convicted of first degree felony-murder and was sentenced to life imprisonment without the possibility of parole.

On appeal, the Court addressed two of the appellant's primary assignments of error: (1) the admission of the appellant's statements made prior to being presented before a magistrate, and (2) the admission of the appellant's statements made during the course of the polygraph examinations.

The Court first addressed the admission of the statements made by the appellant prior to his presentment before the magistrate in Ritchie County. Reviewing the issue under the prompt presentment rule enunciated in *W. Va. Code* § 62-1-5(a)(1) (1997), Syllabus Point 1 of *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984), and in light of the testimony of a police officer that his "primary concern" was to obtain a statement from the appellant, the Court determined that the primary purpose in the delay in taking the appellant before a magistrate was to obtain a confession, which was a violation of the prompt presentment rule.

The Court considered the arguments of the State that (1) the repeated provision of Miranda warnings to the appellant prior to his presentment before a magistrate rendered the statements voluntary and admissible, and (2) that since only the contents of the appellant's statements were introduced at trial, and not the statements themselves, no legal consequence should flow from the delay.

The Court determined that repeated administration of Miranda warnings to a suspect does not nullify the prompt presentment rule. Additionally, the Court applied the "fruit of the poisonous tree" doctrine to the statements, holding that neither statements obtained from a suspect in violation of the prompt presentment rule, or the contents thereof, may be introduced against the accused at trial.

Syllabus Point 1 - When a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement may be introduced against the accused at trial.

Turning the to appellant's second contention, the Court agreed that the trial court had erred in not suppressing the statements made by the appellant during the administration of the polygraph examinations. The Court concluded that the failure by the police to provide Miranda warnings at the time of the administration of the tests was error.

Syllabus Point 2 - Miranda warnings must be given to a criminal suspect, who is in custody, prior to conducting a polygraph examination.

PROMPT PRESENTMENT RULE

Statements obtained in violation of (continued)

State v. DeWeese (continued)

In arriving at this conclusion, the Court rejected three separate arguments by the State for the admissibility of the statements.

First, the Court determined that the presence of the appellant's counsel during the administration of the polygraph tests did not obviate the need for giving the required warnings. The Court noted that, under *Miranda*, "the mere presence of defense counsel at an interrogation does not negate the necessity for providing the warning against self-incrimination."

Syllabus Point 3 - Prior to giving a polygraph examination, the police must inform the defendant of his *Miranda* rights even though defense counsel is present in the room with the defendant when a polygraph examination is about to be given.

Second, the Court held that despite a waiver by the appellant's counsel, a defendant may not waive the reading of the *Miranda* warnings. The Court noted that, "[n]othing but mischief would flow from a rule that would permit a defendant to waive the right to be informed of the rights embodied in the *Miranda* warnings."

Syllabus Point 4 - While a defendant may waive the rights articulated under the *Miranda* warnings, a defendant cannot, as a matter of law, waive the reading of the *Miranda* warnings.

Third, the Court addressed the argument that the appellant did not have to be provided new *Miranda* warnings at the time the tests were administered because he had been given *Miranda* warnings on three previous occasions. The Court addressed this issue of first impression and adopted a test to be used to determine whether *Miranda* warnings have become so stale as to dilute their effectiveness.

Syllabus Point 5 - In determining whether the initial *Miranda* warnings have become so stale as to dilute their effectiveness so that renewed warnings should have been given due to a lapse in the process of interrogation, the following totality-of-the-circumstances criteria should be considered: (1) the length of time between the giving of the first warnings and subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect.

In applying this test to the facts, the Court determined that the seven-day delay between the *Miranda* warnings of September 2 and the administration of the polygraph tests on September 9 required, "as a matter of public policy", a renewal of the appellant's *Miranda* rights.

PROMPT PRESENTMENT RULE

Statements obtained in violation of (continued)

State v. DeWeese (continued)

The Court concluded that the trial court had erred in not suppressing the statements made by the appellant prior to his arraignment before a magistrate and during the polygraph examinations, and reversed the appellant's conviction and sentence.

Reversed and remanded for new trial.

PROSECUTING ATTORNEY

Comments on defendant's silence

Comment on pre-trial silence

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Improper comments to jury

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Conduct at trial

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Improper comments to jury

State v. Adkins, 209 W.Va. 212, 544 S.E.2d 914 (2001) (Per Curiam) (Affirmed)

The primary issue concerned certain statements made by the prosecuting attorney during closing arguments. The Court held that statements by the prosecutor during the initial closing argument that the defendant and one of his witnesses were "liars" did not rise to the level of plain error, due primarily to the fact that no objection had been made to the statement.

The Court also found that statements made by the prosecutor during the rebuttal closing argument regarding inconsistencies between the defendant's testimony and his pretrial statements to the police (which had not been admitted into evidence) did not mislead the jury or prejudice the accused and accordingly, found no error.

Syl. pt. 1 - "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syllabus point 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

PROSECUTING ATTORNEY

Conduct at trial (continued)

Improper comments to jury (continued)

State v. Adkins (continued)

Syl. pt. 2 - "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syllabus point 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945).

Syl. pt. 3 - "Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syllabus point 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

Improper statements during sentencing

Mugnano v. Painter, 212 W.Va. 831, 575 S.E.2d 590 (2002) (Per Curiam) (Affirmed)

See HABEAS CORPUS Plea agreement, Violation of, (p. 180) for discussion of topic.

Reference to parole eligibility

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

PROSECUTING ATTORNEY

Disciplinary actions

Lawyer Disciplinary Board v. Scott, ___ W.Va. ___, 579 S.E.2d 550 (2003) (Davis, J.) (Suspension of Law License for Three Years)

See ATTORNEYS Discipline, Mitigating factors, (p. 59) for discussion of topic.

Disqualification

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Exculpatory evidence

State ex rel. Justice v. Trent, 209 W.Va. 614, 550 S.E.2d 404 (2001) (Per Curiam) (Affirmed)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 112) for discussion of topic.

Failure to disclose

State ex rel. Justice v. Trent, 209 W.Va. 614, 550 S.E.2d 404 (2001) (Per Curiam) (Affirmed)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 112) for discussion of topic.

Relationship with witness as grounds for disqualification

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

PROSECUTING ATTORNEY

Standards for disqualification

State v. Keenan, ___ W.Va. ___, ___ S.E.2d ___ (No. 30851, June 19, 2003) (Per Curiam)
(Reversed and Remanded)

See DISCOVERY Failure to provide, (p. 113) for discussion of topic.

RAPE SHIELD STATUTE

Evidence

State v. Parsons, ___ W.Va. ___, ___ S.E.2d ___ (No. 30693, June 27, 2003) (Per Curiam)
(Affirmed)

See EVIDENCE Rape shield statute, (p. 157) for discussion of topic.

RECIDIVIST OFFENSES

Constitutionality of statute

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

Driving under the influence as triggering offense

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

The petitioner, Appleby, was charged in an indictment with third-offense DUI and driving on a revoked license, DUI -related, third-offense. Each of these charges are felonies with identical mandatory one to three year prison sentences.

On the day of trial, and without a written plea agreement with the State, the petitioner agreed to plead guilty to both charges. The trial court advised the petitioner that under the plea, he would be subject to a maximum sentence of two to six years imprisonment. The trial court accepted the plea and ordered the preparation of a pre-sentence investigation report.

Three days after the plea, the State filed a recidivist information under *W.Va. Code*, § 61-11-18. The State alleged that the petitioner had five prior felony convictions, including three prior convictions for third-offense DUI, one prior conviction of driving on a revoked license, DUI-related, third offense, and one prior conviction of unlawful assault.

The petitioner filed a motion to dismiss the information, which the trial court denied. The petitioner then filed for a writ of prohibition with the Supreme Court of Appeals, arguing (1) that the trial court had improperly permitted the filing of the information and had failed to advise the petitioner, at the time of his plea, that he could face recidivist proceedings; (2) that the United States Supreme Court opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000) invalidated West Virginia's statutory recidivist procedures; (3) that the recidivist proceedings, applied to a DUI-third offense charge, is constitutionally disproportionate; and (4) that the recidivist statute was void for vagueness.

The Court held that the three-day delay in filing the information was not impermissible. The Court noted that the immediacy requirement of § 61-11-19 is satisfied if the State files the information prior to a defendant's sentencing and before the end to the term of court in which the defendant is convicted.

RECIDIVIST OFFENSES

Driving under the influence as triggering offense (continued)

State ex rel. Appleby v. Recht (continued)

Syllabus Point 2 - "A person convicted of a felony may not be sentenced pursuant to *W. Va. Code*, 61-11-18, -19 [1943], unless a recidivist information and any or all material amendments thereto as to the person's prior conviction or convictions are filed by the prosecuting attorney with the court before expiration of the term at which such person was convicted, so that such person is confronted with the facts charged in the entire information, including any or all material amendments thereto. *W. Va. Code*, 61-11-19 [1943]." Syllabus point 1, *State v. Cain*, 178 W.Va. 353, 359 S.E.2d 581 (1987)

The Court also held that the trial court was not required, under Rule 11(c)(1) of the West Virginia Rules of Criminal Procedure, to advise the petitioner of the possibility of the filing of a recidivist proceeding. The Court noted that a life sentence under a recidivist proceeding is not a "definite, immediate and largely automatic" consequence of a felony conviction, and therefore the trial court was not required to advise the petitioner of the possibility of such a filing. (In a footnote, the Court suggested that while it was not required, it might be a "better course of action" for the trial court to advise a defendant of the recidivist possibility.)

Syllabus Point 3 - "The primary purpose of our recidivist statutes, *W. Va. Code*, 61-11-18 (1943), and *W. Va. Code*, 61-11-19 (1943), is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." Syllabus point 3, in part, *State v. Jones*, 187 W.Va. 600, 420 S.E.2d 736 (1992).

The Court also held that under *Apprendi, supra*, and *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed. 2d 350 (1998), that (1) there is no constitutional requirement that a recidivist enhancement be charged in the indictment for the triggering offense, and (2) that there is no federal constitutional right to have the fact of the predicate convictions proven to a jury beyond a reasonable doubt.

The Court also refused to adopt the petitioner's argument that the application of a recidivist life sentence, based on a conviction for felony drunk driving, is constitutionally disproportionate. The Court noted that it had "little trouble in finding that driving under the influence is a crime of violence supporting imposition of a recidivist sentence", and further noted that the "egregious, socially reprehensible, apparently incorrigible and indisputably dangerous conduct" violated no proportionality principle.

Syllabus Point 5 - "Despite the fact that a third offense DUI felony conviction pursuant to West Virginia Code § 17C-5-2(j) (Supp.1995) results from an enhanced misdemeanor, the Legislature intended that this type of felony conviction be used for sentence enhancement in connection with the terms of the recidivist statute, West Virginia Code § 61-11-18 (Supp.1995)." Syllabus point 3, in part, *State v. Williams*, 196 W.Va. 639, 474 S.E.2d 569 (1996).

RECIDIVIST OFFENSES

Driving under the influence as triggering offense (continued)

State ex rel. Appleby v. Recht (continued)

Finally, the Court held that the petitioner's argument that § 61-11-18 was "void for vagueness" failed due to the "plain and unambiguous" meaning of the statute and the lack of standing on the part of the petitioner to raise a facial challenge to the statute.

Writ of Prohibition Denied.

Procedure for filing information

State v. Cavallaro, 210 W.Va. 237, 557 S.E.2d 291 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

The defendant was indicted for malicious wounding. Following his conviction for the lesser included offense of unlawful wounding, the state filed an information charging the defendant under the habitual offender statute, *W.Va. Code* § 61-11-19, as amended. The defendant was not brought before the court to answer the information until the following week, which was the first week of the ensuing term of court. The defendant objected to the proceedings and moved for dismissal of the information. This motion was denied, and the defendant was subsequently convicted under the habitual offender statute and sentenced to a term of life imprisonment.

The Court reviewed the habitual offender statute and noted the mandatory provision requiring the defendant be brought before the court to answer the information prior to the expiration of the term during which he is convicted. Because this procedure was not followed, the Court vacated the defendant's life sentence and remanded the case back to the circuit court.

Syl. pt. 1 - "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 2 - "A person convicted of a felony cannot be sentenced under the habitual criminal statute, [*W.Va.*] *Code* § 61-11-19 [(2000)], unless there is filed by the prosecuting attorney with the court at the same term, and before sentencing, an information as to the prior conviction or convictions and for the purpose of identification the defendant is confronted with the facts charged in the information and cautioned as required by the statute." Syllabus point 3, *State ex rel. Housdon v. Adams*, 143 W.Va. 601, 103 S.E.2d 873 (1958).

RECIDIVIST OFFENSES

Procedure for filing information

Generally

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

Prosecutorial disqualification

State ex rel. Keenan v. Hatcher, 210 W.Va. 307, 557 S.E.2d 361 (2001) (McGraw, J.) (Reversed)

See ATTORNEYS Prosecuting attorney, Disqualification, (p. 66) for discussion of topic.

Validity of procedure under Apprendi v. New Jersey

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

RIGHT TO REMAIN SILENT

Testimony at trial

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

ROBBERY

Sentencing

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

SEARCH AND SEIZURE

Consent

Authority of curator of estate

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Implied consent to search

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

On April 29, 1996, the appellant and his wife were guests in a cabin at a state park. In the early morning hours of April 30, 1996, the appellant contacted the 911 operator and reported that he and his wife had been attacked in the cabin by an unknown assailant. When the police arrived, they discovered that the appellant's wife had been killed by a blow to the head. The appellant had sustained some contusions and scratches.

As the investigation continued throughout the morning, a number of inconsistencies began to emerge in the appellant's version of the events. At 10:33 a.m., while at police headquarters, the appellant was advised that he was a suspect in his wife's murder. Without obtaining a search warrant, the police continued to search the cabin and, several hours later, recovered a number of photographs from a closed briefcase. The photographs depicted an associate of the appellant partially clothed beside a stream at the park.

The appellant was convicted in October 1997 of first-degree murder. Following the summary denial of his petition for appeal by the West Virginia Supreme Court of Appeals, the appellant filed his petition for appeal with the United States Supreme Court. The United States Supreme Court, in a per curiam opinion, reversed and remanded the case to the trial court. *Flippo v. United States*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999).

The basis for the reversal was the trial court's erroneous determination that the photographs seized by the police from the briefcase at the scene of the crime were admissible under the "crime scene" exception to the search warrant requirement. The United States Supreme Court, in *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), had squarely rejected the concept of a "murder scene" exception as inconsistent with the Fourth and Fourteenth Amendments.

SEARCH AND SEIZURE

Consent (continued)

Implied consent to search (continued)

State v. Flippo (continued)

On remand, the trial court determined that the photographs were properly seized, and thus admissible, on two separate theories. First, the trial court determined that based upon the appellant's call to the police to report the crime, the appellant had provided an "implied consent" for the police officer to search the cabin. In the alternative, the trial court found that the photographs were admissible under the "inevitable discovery" exception to the search warrant requirement. The trial court also determined that, to the extent that the photographs were erroneously admitted into evidence, such error was harmless beyond a reasonable doubt.

The Court, in a lengthy opinion, affirmed the trial court's denial of the appellant's motion for a new trial.

The Court initially noted that West Virginia has not previously recognized the implied consent exception to the warrant requirement. The Court recognized a significant amount of authority from numerous other jurisdictions which had adopted the implied consent exception, and determined that the exception would be adopted in West Virginia.

Syllabus Point 1 - Consent to search may be implied by the circumstances surrounding the search, by the person's prior actions or agreements, or by the person's failure to object to the search. Thus, a search may be lawful even if the person giving consent does not recite the talismanic phrase: "You have my permission to search."

Syllabus Point 2 - When a person summons the police to a dwelling he/she owns, possesses, or controls, and that person states that a crime was committed against him/her or others by a third person at the premises, he/she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator, absent a contrary limitation imposed by the person summoning the police. As long as the person summoning the police is not a suspect in the case or does not affirmatively revoke his/her implied consent, the police may search the premises without a warrant for the purposes of investigating the reported offense and identifying the perpetrator, and evidence obtained thereby is admissible. If the person affirmatively revokes his/her implied consent or becomes a suspect during the investigation, the police must stop the search and obtain a warrant for the purpose of continuing the search. The implied consent exception is valid only for the initial investigation conducted at the scene, and does not carry over to future visits to the scene.

SEARCH AND SEIZURE

Consent (continued)

Implied consent to search (continued)

State v. Flippo (continued)

However, having adopted the implied consent exception, the Court determined that the appellant had revoked his implied consent to search prior to the discovery of the photographs. The Court noted that the appellant had already been advised that he was a suspect in his wife's murder, and had requested counsel, a considerable time prior to the discovery of the photographs in the briefcase. Thus, the Court held that the photographs were not admissible under the implied consent exception.

The Court also held that the photographs were not admissible under the "inevitable discovery" exception to the exclusionary rule.

Syllabus Point 3 - Under the inevitable discovery rule, unlawfully obtained evidence is not subject to the exclusionary rule if it is shown that the evidence would have been discovered pursuant to a properly executed search warrant.

Syllabus Point 4 - To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.

In determining that the photographs were inadmissible under this exception, the Court adopted the minority view of the inevitable discovery rule. The Court determined that in order for the State to prevail under this rule, the State would have had to show that upon a determination that the appellant was a suspect (thus revoking his consent to search), that the police initiated procedures to obtain a search warrant before the photographs were seized. Since such a showing could not be made under the facts of this case, the Court determined that the photographs were not admissible under the inevitable discovery rule.

Having determined that the photographs were not admissible, the Court concluded that their admission was harmless error. To support this finding, the Court cited two factors.

First, the Court noted that the State had presented "overwhelming evidence" to prove the appellant's guilt beyond a reasonable doubt. This included evidence of planning of the crime by the appellant; evidence of a financial and personal motive for the crime; the staging of the crime scene; evidence that the appellant's injuries were self-inflicted; and evidence of a number of inconsistent statements made by the appellant.

SEARCH AND SEIZURE

Consent (continued)

Implied consent to search (continued)

State v. Flippo (continued)

Second, the Court determined that the photographs themselves were not prejudicial. The appellant claimed that the State improperly utilized the photographs in an attempt to insinuate that a homosexual relationship existed between the appellant and his associate. The Court determined that the photographs had not been used in this manner, but were offered for other non-prejudicial purposes, such as demonstrating the identity of the person in the photographs and the location where the photographs were taken.

Syllabus Point 5 - "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975)." Syllabus point 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

Affirmed.

Revocation of implied consent

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

Consent to blood test

State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002) (Per Curiam) (Affirmed in part; Reversed in part; and Remanded)

See DRIVING UNDER THE INFLUENCE Blood tests, Improper coercion by police officer, (p. 124) for discussion of topic.

Exclusionary rule

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

SEARCH AND SEIZURE

Inevitable discovery rule

State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

Reasonable suspicion

State v. Williams, 210 W.Va. 583, 558 S.E.2d 582 (2001) (Per Curiam) (Conviction Affirmed)

See SEARCH AND SEIZURE Stop and frisk, Grounds for warrantless search, (p. 297) for discussion of topic.

Safety of police officers

State v. Williams, 210 W.Va. 583, 558 S.E.2d 582 (2001) (Per Curiam) (Conviction Affirmed)

See SEARCH AND SEIZURE Stop and frisk, Grounds for warrantless search, (p. 297) for discussion of topic.

Stop and frisk

Grounds for warrantless search

State v. Williams, 210 W.Va. 583, 558 S.E.2d 582 (2001) (Per Curiam) (Conviction Affirmed)

This case involves a stop-and-frisk search of the defendant and his subsequent arrest for possession with intent to deliver cocaine. The Court addressed the application of *Terry v. Ohio*, 392 U.S. 1 (1967) and *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987) to this stop-and-frisk situation.

Following a traffic stop of his girlfriend, the defendant, who was traveling separately, stopped and engaged in discussion with his girlfriend and the police officer. Upon the arrival of additional police officers, the defendant was searched and a utility knife was found in the defendant's pocket. After being handcuffed, the defendant then attempted to dispose of a quantity of cocaine that was in his back pocket.

SEARCH AND SEIZURE

Stop and frisk (continued)

Grounds for warrantless search (continued)

State v. Williams (continued)

The Court held that the stop-and-frisk search of the defendant was justified under *Terry* and *Choat* because, under the particular circumstances of this case, the officers fear for their own safety was warranted. The Court's basis for this conclusion was the testimony of an officer on the scene, who recognized the defendant and "knew that the Appellant owned guns because he had previously reported them stolen". The Court also cited the defendant's action in reaching into his pocket as justification for the frisk.

Syl. pt. 4 - "Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. *U.S. Const.* amend. IV. *W.Va. Const.* art. III, § 6." Syl. Pt. 3, *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987).

The Court also addressed the testimony of the officer who conducted the search and who testified that the search was conducted pursuant to a policy taught at the West Virginia State Police Academy of searching "anybody that has anything to do with that vehicle". The Court emphasized in *dicta* that such a "blanket policy" is not a substitute for the requirements of *Terry* and *Choat*.

The Court also disregarded the defendant's argument that the evidence was insufficient to show "intent to deliver", as required in the indictment. The Court held that the circumstances surrounding the defendant's arrest provided ample proof of intent to deliver.

Syl. pt. 5 - "[I]ntent to deliver a controlled substance can be proven by establishing a number of circumstances among which are the quantity of the controlled substance possessed and the presence of other paraphernalia customarily used in the packaging and delivery of controlled substances." Syl. Pt. 4, in part, *State v. Drake*, 170 W.Va. 169, 291 S.E.2d 484 (1982).

SELF-INCRIMINATION

Prosecutorial misconduct

Pre-trial silence

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

When miranda warnings are required

State v. DeWeese, ___ W.Va. ___, 582 S.E.2d 786, (No. 30733, April 15, 2003) (Davis, J.) (Reversed and Remanded)

See PROMPT PRESENTMENT RULE Statements obtained in violation of, (p. 278) for discussion of topic.

SENTENCING

As trigger for recidivist statute

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

Credit for jail time

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

Credit for time served

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

See AGREEMENT ON DETAINERS Time limits, (p. 27) for discussion of topic.

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

SENTENCING

Credit for time served

How computed

State v. Scott, ___ W.Va. ___, ___ S.E.2d ___ (No. 30692, May 7, 2003) (Starcher, J.)
(Reversed and Remanded)

See SENTENCING Credit for time served, Youthful offender act, (p. 301) for discussion of topic.

Youthful Offender Act

State v. Scott, ___ W.Va. ___, ___ S.E.2d ___ (No. 30692, May 7, 2003) (Starcher, J.)
(Reversed and Remanded)

The appellant pleaded guilty to the felony offenses of uttering and transportation of controlled substances into a jail. Following a diagnostic evaluation, the trial court elected to send the appellant to the Anthony Youth Center.

The appellant successfully completed the program at the Youth Center and was placed on probation. However, the probation officer subsequently filed a motion to revoke the appellant's probation. The appellant later admitted to the circuit judge that he had violated various terms and conditions of his probation.

The trial court imposed consecutive sentences of imprisonment of one to ten years (uttering) and one to five years (transporting). The trial court also ordered that the appellant be given credit for 567 days spent in custody on the charges. However, the trial court ordered that the credit be apportioned unevenly, granting the appellant 565 days credit on the uttering charge and two days credit on the transporting charge.

The appellant asserted on appeal that the credit apportionment by the trial court improperly deprived him of an early appearance before the Parole Board, because virtually all of the time was applied solely against the uttering sentence. The appellant contended that the circuit court's order actually mandated that the appellant spend more than two years in custody before being eligible to appear before the Parole Board. The circuit court's order essentially required that he first spend 565 days in custody for uttering, and then spend another 365 days (2 days credit plus an additional 363 days) in custody for transporting--a total of 930 days--before being eligible to appear before the Parole Board. The appellant contended that by requiring him to spend 200 additional days in custody before being eligible to see the Parole Board, the circuit court actually imposed a sentence greater than the sentence the appellant would have received if he had avoided the young adult offender program and gone directly to prison.

Syllabus Point 1 -"Penal statutes must be strictly construed against the State and in favor of the defendant." Syllabus Point 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

SENTENCING

Credit for time served (continued)

Youthful Offender Act (continued)

State v. Scott (continued)

Syllabus Point 3 - "The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable." Syllabus Point 6, *State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783 (2002).

Syllabus Point 4 - "The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable." Syllabus Point 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978).

Syllabus Point 5 - "Where a criminal defendant has been placed on probation after successfully completing a program of rehabilitation under the Youthful Offenders Act, *W. Va. Code* § 25-4-1 to -12, and such probation is subsequently revoked, the circuit court has no discretion under *W. Va. Code* § 25-4-6 to impose anything other than the sentence that the defendant would have originally received had he or she not been committed to a youthful offender center and subsequently placed on probation." Syllabus Point 4, *State v. Richards*, 206 W.Va. 573, 526 S.E.2d 539 (1999).

The Court agreed with appellant and held that the trial court had improperly apportioned the credit on the appellant's sentence. Strictly construing the Youthful Offender Act against the State and in favor of the appellant, the Court held that the Legislature had intended for circuit judges to sentence young adult offenders to the same length of sentence, and reach eligibility to appear before the Parole Board in the same length of time, whether or not they participated in a young adult offender program.

Syllabus Point 6 - Where a criminal defendant has been placed on probation after successfully completing a program of rehabilitation at a young adult offender center under the Youthful Offenders Act, *W. Va. Code*, 25-4-1 to -12, and such probation is subsequently revoked, pursuant to *W. Va. Code*, 25- 4-6 [2001] the circuit court's sentencing order must credit the defendant with time spent in incarceration in such a manner that the defendant's date of eligibility for parole is the same as if the defendant had not been committed to a young adult offender center and subsequently placed on probation.

SENTENCING

Credit for time served (continued)

Youthful Offender Act (continued)

State v. Scott (continued)

Noting that the circuit court's order had increased by 200 days the amount of time the appellant was required to spend in custody before being eligible to see the Parole Board compared to the amount of time the appellant would have spent in custody had he not received youthful offender treatment, the Court reversed the trial court's sentencing order and remanded the case for correction of the sentencing order.

Reversed and Remanded.

Dismissal of fines and costs

State ex rel. Holcomb v. Nibert, 212 W.Va. 499, 575 S.E.2d 109 (2002) (Per Curiam) (Writ of Mandamus Denied)

See FINES AND COSTS Dismissal of, (p. 172) for discussion of topic.

Disparate sentences between co-defendants

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See JURY Exclusion of African-American in peremptory strikes, (p. 217) for discussion of topic.

Enhancement of sentence

Use of out-of-state convictions

State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001) (Albright, J.) (Affirmed in Part, Reversed in Part, and Remanded with Instructions)

See DOMESTIC VIOLENCE Enhancement of sentence, Use of out-of-state convictions, (p. 117) for discussion of topic.

SENTENCING

Excessive sentence

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

The appellant was charged in a 206-count indictment with various sexual offenses involving his children. After a three-day trial, the appellant was convicted of thirty-eight counts each of first degree sexual assault, incest, sexual abuse by a parent, and first degree sexual abuse. The trial court sentenced the appellant to 15 to 35 years on each of the convictions for first degree sexual assault; 5 to 15 years on each of the convictions for incest; 10 to 20 years for each conviction of sexual abuse by a parent; and 1 to 5 years for each conviction of sexual abuse in the first degree. The trial court ordered that, with the exception of the sentences for first degree sexual abuse, each of the sentences be served consecutively. Thus, the appellant was sentenced to a term of imprisonment of 1,140 to 2,660 years.

On appeal, the appellant asserted that (1) his case was improperly presented to the grand jury because it was based solely upon the testimony of the investigating officer; (2) the indictment was insufficient because it was not plain, concise or definite and that the number of charges was determined arbitrarily; (3) the statement he gave to the police was involuntary and should have been suppressed; (4) a prospective juror should have been excused for cause; (5) the evidence was insufficient and did not support 152 convictions; and (6) his sentences are disproportionate to the offenses charged and constitute cruel and unusual punishment.

The Court denied relief to the appellant on the majority of his assignments of error. The Court held that (1) since the appellant did not allege constitutional error or prosecutorial misconduct, the appellant could not challenge the manner of presentment of the indictment; (2) the indictment substantially followed the language of the relevant statutes and did not require a specific allegation of the date of the occurrence of the acts; (3) there was no evidence indicating that an inculpatory statement provided by the appellant to the police was not freely and voluntarily given; (4) the trial court did not abuse its discretion in declining to dismiss a juror whose son-in-law was acquainted with the investigating officer while simultaneously dismissing a juror who indicated that her husband had been “railroaded” into a federal conviction; and (5) that the evidence of the crimes, including the testimony of the victim and the appellant’s corroborating statement, viewed in the light most favorable to the state, was sufficient to sustain the convictions.

The Court agreed, however, with the appellant’s assertion that his sentence of 1,140 to 2,660 years imprisonment was shocking and an abuse of discretion. Citing the two-part “subjective/objective” proportionality test set forth in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), the Court determined that an inquiry into the objective portion of the test was not necessary. The Court held that the sentences imposed were so offensive as to shock the conscience of the Court, and stated that the trial court had “effectively imposed multiple life sentences” upon the appellant.

SENTENCING

Excessive sentence (continued)

State v. David D. W. (continued)

Syllabus Point 9 - "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syllabus Point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Syllabus Point 10 - "A criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution." Syllabus Point 7, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Convictions affirmed, reversed and remanded for resentencing.

Fines and costs

State ex rel. Holcomb v. Nibert, 212 W.Va. 499, 575 S.E.2d 109 (2002) (Per Curiam) (Writ of Mandamus Denied)

See FINES AND COSTS Dismissal of, (p. 172) for discussion of topic.

"Good-time" credit

Generally

State ex rel. Bailey v. Rubenstein, Commissioner, ___ W.Va. ___, ___ S.E.2d ___ (No. 31148, June 19, 2003) (Per Curiam) (Writ of Mandamus Granted)

The petitioner was sentenced to one to three years for third Offense DUI. Upon arriving at the correctional center, he was provided a statement listing a minimum discharge date of eighteen months. This date presumed a period of eighteen months "good-time" credit.

The petitioner was subsequently involved in a number of disciplinary infractions. Following a hearing, a "magistrate" at the correctional center issued three separate orders, each of which revoked six months of "good-time" credit from the petitioner's sentence. The effect of this ruling was the removal of all possible "good-time" credit, and the requirement that the petitioner serve a full three years on his sentence.

SENTENCING

“Good-time” credit (continued)

Generally (continued)

State ex rel. Bailey v. Rubenstein, Commissioner (continued)

The petitioner sought a writ of mandamus to compel the restoration of most of the revoked "good-time". The petitioner argued that since he had only served 156 days of incarceration at the time of the notice of revocation, he could only be assessed a loss of 156 days of "good-time" credit, since such time is allotted on a day-for-day basis. Thus, the petitioner argued, since he had not yet earned the "good-time" reduction, it could not be arbitrarily revoked.

Syllabus Point 1 - "Before this Court may properly issue a writ of mandamus three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." Syl. pt. 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

Syllabus Point 2 - "Good time credit is a valuable liberty interest protected by the due process clause, W.Va. Const. art. III § 10." Syl. pt. 2, *State ex rel. Gillespie v. Kendrick*, 164 W.Va. 599, 265 S.E.2d 537 (1980).

Syllabus Point 3 - "The provisions of West Virginia Code § 28-5-27 (1992) solely govern the accumulation of 'good time' for inmates sentenced to the West Virginia State Penitentiary." Syl. pt. 3, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997).

The Court agreed with the petitioner's contentions. The Court held that "good-time" credits, while a legislative creation, cannot be arbitrarily removed. The Court noted that under W.Va. Code § 28-5-27(f) (1984), all or part of good-time credit "which has been granted to such inmate" can be revoked for violations. However, the Court noted that this provision applies "only to those days that an inmate has actually earned by being incarcerated and behaving properly."

Therefore, since the petitioner could have earned only 156 days of "good-time" at the time of the revocation, he could only have 156 days of "good-time" revoked.

Writ of Mandamus Granted.

Standards for revocation

State ex rel. Bailey v. Rubenstein, Commissioner, ___ W.Va. ___, ___ S.E.2d ___ (No. 31148, June 19, 2003) (Per Curiam) (Writ of Mandamus Granted)

See SENTENCING "Good-time" credit, Generally, (p. 305) for discussion of topic.

SENTENCING

Modification of sentence for juvenile offenders

State v. Johnson, ___ W.Va. ___, ___ S.E.2d ___ (No. 30903, May 6, 2003) (Per Curiam) (Affirmed)

See EVIDENCE Admissibility, Drug use by crime victim, (p. 140) for discussion of topic.

Permissible factors

State v. Manley, 212 W.Va. 509, 575 S.E.2d 119 (2002) (Per Curiam) (Affirmed)

See SENTENCING Proportionality, Sentences with fixed maximum period of incarceration, (p. 313) for discussion of topic.

Plea agreement

State v. Taylor, ___ W.Va. ___, 568 S.E.2d 50 (2002) (Per Curiam) (Affirmed in Part, Reversed in part, and Remanded)

See *EX POST FACTO* Amended recidivist statute as violating, (p. 168) for discussion of topic.

Presentence investigation and report

When required

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, Remanded)

The defendant was convicted of two counts of first-degree murder and was sentenced to two consecutive life terms in the penitentiary. The Court addressed a number of issues, including the presence of a thirteenth juror during deliberations; the dismissal and replacement of a juror who arrived late for court; the defendant's right to be present during a discussion of jury instructions; the denial of a motion for continuance; the request by a defendant to retain a jury selection expert; and the denial of a motion for a jury view. Although the presence of the thirteenth juror during deliberation was held to be error, the Court held that the defendant had not shown whether the extra juror's presence affected the defendant's substantial rights, and thus did not meet the test for plain error. The Court determined that none of the above issues constituted reversible error.

However, the Court reversed the decision of the trial court in determining that a presentence report was not required prior to sentencing the defendant, and remanded the matter for the preparation of a presentence investigation report and new sentencing hearing.

SENTENCING

Presentence investigation and report (continued)

When required (continued)

State v. Brown (continued)

Syl. pt. 1 - "When a defendant fails to object to an alternate juror retiring to the jury room with the regular jurors, we will consider the circumstances under the plain error rule of West Virginia Rule of Criminal Procedure 52(b). We expressly overrule and no longer adhere to the rigid standard of *State v. Hudkins*, 35 W.Va. 247, 13 S.E. 367 (1891), which states that when thirteen jurors are empaneled and render a verdict, the judgment of the circuit court must be reversed and set aside." Syllabus Point 2, *State v. Lightner*, 205 W.Va. 657, 520 S.E.2d 654 (1999).

Syl. pt. 3 - "It is within the sound discretion of the court in the trial of a felony case, if a juror, at any time after he is sworn, and before verdict, becomes, from any cause, unable to discharge his duties as such juror, to discharge such juror, and substitute another qualified juror in his place[.]" Syllabus Point 1, in part, *State v. Davis*, 31 W.Va. 390, 7 S.E. 24 (1888).

Syl. pt. 4 - "The defendant has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the state is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." Syllabus Point 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 6 - "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syllabus Point 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Syl. pt. 10 - "Upon request for additional expert fees under [*W.Va. Code* § 29-21-13a(e) (1997)]: (1) the request should be made in writing; (2) the request should detail why the expert is needed; (3) defense counsel should be permitted an opportunity to elaborate on the motion; and (4) in denying the motion, the trial judge should place in the record the specific reasons for his ruling." Syllabus Point 1, *State ex rel. Foster v. Luff*, 164 W.Va. 413, 264 S.E.2d 477 (1980).

Syl. pt. 11 - "A motion for jury view lies peculiarly within the discretion of the trial court, and, unless the denial of such view works probable injury to the moving party, the ruling will not be disturbed." Syllabus Point 1, *Collar v. McMullin*, 107 W.Va. 440, 148 S.E. 496 (1929).

SENTENCING

Probation

Jail imposed as a condition of

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) (Albright, J.) (Reversed in Part and Remanded)

See PROBATION Jail imposed as a condition of, (p. 274) for discussion of topic.

Proportionality

As between co-defendants

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See JURY Exclusion of African-American in peremptory strikes, (p. 217) for discussion of topic.

Driving under then influence as triggering offense

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

Excessive sentence

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

SENTENCING

Proportionality (continued)

Factors to consider (continued)

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See JURY Exclusion of African-American in peremptory strikes, (p. 217) for discussion of topic.

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

Generally

State ex rel. Ballard v. Painter, ___ W.Va. ___, 582 S.E.2d 737 (No. 30648, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See JURY Exclusion of African-American in peremptory strikes, (p. 217) for discussion of topic.

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

The appellant, Ronald L. Adams, was charged in an indictment with two counts of aggravated robbery. Although there was no evidence that a weapon was used, the appellant apparently assaulted the clerk of a store during the course of one of the robberies. In June 2000, the appellant entered into a plea agreement whereby the appellant would plead guilty to one count of aggravated robbery in exchange for the State's agreement to dismiss the remaining count and further agreement to not file a recidivist information against the appellant. The plea agreement also indicated that the state would recommend that the appellant receive a ninety (90) year sentence.

After hearing statements from both parties at the sentencing hearing, the trial court accepted the State's recommendation and sentenced the appellant to 90 years imprisonment. The trial court subsequently denied the appellants motion for reduction of sentence.

SENTENCING

Proportionality (continued)

Generally (continued)

State v. Adams (continued)

The appellant's sole issue on appeal was that the sentence imposed was disproportionate to the crime on which it was based.

Syl. pt. 1 - "The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syllabus point 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).

Syl. pt. 2 - "In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syllabus point 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The Court reviewed the sentence under the "subjective/objective" tests outlined in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). Under the "subjective" test, the Court reviewed the facts surrounding the offense to determine whether the sentence imposed shocked the conscience of the Court. The Court noted the appellant's five prior felony convictions; the dismissal of the second count of the indictment; the State's abandonment of its right to pursue a life sentence under the recidivist statute; and the appellant's understanding that the state would seek a 90 year sentence, as factors indicating that the sentence did not shock the conscience.

Under the "objective" test, the Court gave consideration to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with that in other states, and a comparison with other offenses in West Virginia. In reviewing all of these factors, the Court determined that under the totality of all of these circumstances, it could not be said that the sentence was disproportionate.

State v. David D. W., ___ W.Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003) (Per Curiam) (Affirmed in part, Reversed in part, and Remanded)

See SENTENCING Excessive sentence, (p. 304) for discussion of topic.

SENTENCING

Proportionality (continued)

Generally (continued)

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

The appellant, Lance Tyler, was indicted for two counts of aggravated robbery. The charges stemmed from an incident where the appellant and an unknown accomplice approached two teenage girls in a parking garage, brandished a small handgun, and demanded money.

The appellant subsequently entered into a plea agreement whereby the appellant pled guilty to one count of aggravated robbery in exchange for dismissal of the remaining charge and the State's agreement to recommend a 15-year sentence. At his sentencing hearing, the trial court accepted statements and argument on behalf of the appellant and on behalf of the victims, including the victim impact statements and a statements from the father of one of the victims. The trial court then sentenced the appellant to a term of 30 years imprisonment. The court subsequently entertained arguments and statements at a hearing on the appellant's motion for reconsideration, including another statement from the father of the victim. The court denied the appellant's motion for reconsideration.

As in *State v. Adams*, 211 W.Va. 231, 565 S.E.2d 353 (2002), the Court reviewed the proportionality of the appellant's sentence under the "subjective/objective" standards expressed in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

Subjectively, the Court determined that the appellant's 30-year sentence did not "shock the conscience" of the Court. This conclusion appears to have been based on two primary factors: first, the use of a deadly weapon in the commission of the crime, and second, the appellant's refusal to divulge the identity of the accomplice or to provide the location of the weapon used in the robbery.

Objectively, the Court observed the same factors noted by the Court in *Adams*, including the nature of the offense, the legislative purpose behind the punishment, a comparison with the sentences of other states for aggravated robbery, and West Virginia precedent. The Court concluded, as in *Adams*, that none of these objective factors indicated that the sentence was constitutionally disproportionate, and that the appellants sentence was therefore permissible.

The Court briefly addressed the issue of the statements of the father of the victim at the sentencing and reconsideration hearings. The Court noted that such statements were permissible under *W. Va. Code*, § 61-11A-2 and *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984). No error.

SENTENCING

Proportionality (continued)

Sentences with fixed maximum period of incarceration

State v. Manley, 212 W.Va. 509, 575 S.E.2d 119 (2002) (Per Curiam) (Affirmed)

The appellant, Donna Manley, was charged in four separate indictments with a substantial number of forgery and uttering offenses, along with conspiracy and a related burglary charge. Prior to trial, the appellant negotiated a plea agreement wherein the appellant would plead guilty to six counts of forgery, six counts of uttering, one count of conspiracy, and one count of burglary. As part of the plea agreement, the State agreed to remain silent at the appellant's sentencing, apart from a recommendation that all sentences on the forgery and uttering charges be served concurrently.

At the appellant's sentencing hearing, the trial court sentenced the appellant to eight-to-eighty years in the penitentiary. The appellant filed for a reduction of sentence, and the court responded by reducing her sentence to a sentence of six-to-sixty years imprisonment.

The appellant sought appellate review of the sentence, contending that (1) the sentence was disproportionate to the character, nature and degree of the offenses she had committed, and (2) the sentence was disproportionate when compared with the sentences assigned to her co-defendants.

Syllabus Point 1 - "In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syllabus Point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syllabus Point 2 - "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syllabus Point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Syllabus Point 3 - "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syllabus Point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

SENTENCING

Proportionality (continued)

Sentences with fixed maximum period of incarceration (continued)

State v. Manley (continued)

Syllabus Point 4 - “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

The Court began its analysis by noting the holding in *Wanstreet* that the constitutional proportionality standards are generally only applicable to those sentences where there is no fixed maximum sentence set by statute or where there is a life recidivist sentence. The Court noted that this was not applicable in the appellant’s case, and that each of the statutes under which the appellant was sentenced contain fixed maximum periods of incarceration (i.e., one-to-ten years for forgery). Thus, the Court found that the sentence imposed on the appellant did not warrant the application of the proportionality standards.

The Court further found that since the sentences were imposed within legislatively prescribed limits, and were not based on other “impermissible factors”, that the sentences did not warrant appellate review.

As a final, ironic note, the Court noted that it “would not have necessarily given the appellant such a lengthy sentence”, and noted that the appellant could seek further reduction of her sentence with the trial court.

Sentence Affirmed.

Recidivist offenses

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

State v. Cavallaro, 210 W.Va. 237, 557 S.E.2d 291 (2001) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See RECIDIVIST OFFENSES Procedure for filing information, (p. 289) for discussion of topic.

SENTENCING

Recidivist proceedings

State ex rel. Appleby v. Recht, ___ W.Va. ___, 577 S.E.2d 734 (No. 30737, December 4, 2002) (Per Curiam) (Writ of Prohibition Denied)

See RECIDIVIST OFFENSES Driving under the influence as triggering offense, (p. 287) for discussion of topic.

State v. Taylor, ___ W.Va. ___, 568 S.E.2d 50 (2002) (Per Curiam) (Affirmed in Part, Reversed in part, and Remanded)

See *EX POST FACTO* Amended recidivist statute as violating, (p. 168) for discussion of topic.

Reconsideration of sentence

State v. Redman, ___ W.Va. ___, 578 S.E.2d 369 (No. 30534, February 28, 2003) (Per Curiam) (Affirmed)

On March 31, 1995, the appellant pleaded guilty to three counts of burglary and two counts of grand larceny and on June 9, 1995 was sentenced to a cumulative sentence of five to sixty-five years, with all sentences running consecutively. This sentence was subsequently modified on August 28, 1997 to permit the grand larceny sentences to be served concurrently to one another, thus establishing a total sentence of four to fifty-five years. This sentence was later suspended and the appellant was placed on probation on June 4, 1999. However, in November 1999, the State moved for revocation of this probation. On March 16, 2001, the circuit court revoked the appellant's probation and imposed the original sentence, with credit for time served.

On June 25, 2001 the appellant filed for reconsideration of the sentence pursuant to Rule 35 (b) of the Rules of Criminal Procedure. On July 23, 2001, the trial court denied the motion for reconsideration, and indicated that it was denying the motion because the appellant had "made the same argument and assigned the same reasons previously given at sentencing for the defendant."

The appellant sought review of this ruling, arguing (1) that the trial court had failed to make required findings of fact and conclusions of law in denying the motion for reconsideration, and (2) that the trial court had failed to properly consider the issue of rehabilitation in arriving at its decision. The appellant primarily took umbrage at the trial court's statement during the July 23, 2001 hearing that, "[w]e're here to punish you, sir", and argued that such a statement indicated an abuse of discretion on the part of the trial court.

SENTENCING

Reconsideration of sentence (continued)

State v. Redman (continued)

Syllabus Point 1 - "In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review." Syl. Pt. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

The Court acknowledged that rulings issued by a trial court must contain requisite findings of fact and conclusions of law so as to permit meaningful appellate review. However, the Court noted that the trial court's ruling of July 23, 2001 specifically referenced its previous rulings set forth in the March 16, 2001 order revoking the appellant's probation. The Court noted that because nothing new had transpired between the initial revocation and the filing of the reconsideration motion, and given the absence of new evidence or legal arguments, the trial court did not abuse its discretion in making no new findings of fact and conclusions of law following the reconsideration hearing.

The Court also noted that while rehabilitation is a goal of sentencing, such goals could not be "made in a vacuum separate from the relevant facts that weigh on the serious issue and its attendant consequences on the community at large." In light of a number of other factors, chiefly, the severity of the appellant's crimes; the fact that the appellant had been permitted to plead to reduced charges; the appellant's violation of probation due to a continuing drug problem; and the fact that the appellant was charged with federal drug offenses while incarcerated, the Court did not find any abuse of discretion on the part of the trial court in denying reconsideration of sentence.

Syllabus Point 2 - "Inmates incarcerated in West Virginia state prisons have a right to rehabilitation established by *W.Va. Code* § 62-13-1 and 62-13-4 (Cum. Supp. 1980), and enforceable through the substantive due process mandate of article 3, section 10 of the West Virginia Constitution." Syl. Pt. 2, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

Affirmed.

Required findings and conclusions

State v. Redman, ___ W.Va. ___, 578 S.E.2d 369 (No. 30534, February 28, 2003) (Per Curiam) (Affirmed)

See SENTENCING Reconsideration of sentence, (p. 315) for discussion of topic.

SENTENCING

Rehabilitation as a factor

State v. Redman, ___ W.Va. ___, 578 S.E.2d 369 (No. 30534, February 28, 2003) (Per Curiam) (Affirmed)

See SENTENCING Reconsideration of sentence, (p. 315) for discussion of topic.

Resentencing for appeal purposes

State ex rel. Crupe v. Yardley, ___ W.Va. ___, 582 S.E.2d 782 (No. 30972, April 14, 2003) (Per Curiam) (Writ of Habeas Corpus Granted as Moulded)

See HABEAS CORPUS Resentencing purposes, (p. 181) for discussion of topic.

Right of allocution

State v. Brewster, ___ W.Va. ___, 579 S.E.2d 715 (No. 30598, March 18, 2003) (Per Curiam) (Affirmed)

The appellant pleaded guilty to first-degree sexual assault. At his sentencing hearing, the circuit court inquired of the appellant and his counsel if they had anything “to say with regard to the sentence that should be imposed.” The appellant’s counsel argued for treatment of the appellant under the Youth Adult Offenders Act, *W. Va. Code*, § 25-4-1 to -12 [1999], due to the appellant’s age and lack of a prior criminal record at the time of the incident. The appellant did not speak on his own behalf. The circuit court denied youthful offender treatment and sentenced the appellant to fifteen to thirty-five year in prison.

The appellant asserted on appeal that (1) he was denied the opportunity of allocution at his sentencing hearing, and (2) the circuit court abused its discretion in denying treatment under the Young Adult Offenders Act.

Syllabus Point 1 - “Rule 32(a)(1) [now Rule 32(c)(3)(C)] of the West Virginia Rules of Criminal Procedure confers a right of allocution upon one who is about to be sentenced for a criminal offense.” Syllabus Point 6, *State v. Holcomb*, 178 W.Va. 455, 360 S.E.2d 232 (1987).

Syllabus Point 2 - “In the circuit and magistrate courts of this state, the judge or magistrate shall, *sua sponte*, afford to any person about to be sentenced the right of allocution before passing sentence.” Syllabus Point 6, *State v. Berrill*, 196 W.Va. 578, 474 S.E.2d 508 (1996).

The Court held that the appellant was not denied his right of allocution. The Court noted that the record indicated that the appellant had failed to respond to the circuit court’s inquiry regarding allocution. The Court also observed that counsel for the appellant had addressed the court on the appellant’s behalf.

SENTENCING

Right of allocution (continued)

State v. Brewster (continued)

The Court also held that the circuit court did not abuse its discretion in denying the appellant treatment under the Young Adult Offenders Act. Citing *State v. Allen*, 208 W.Va. 144, 539 S.E.2d 87 (1999), the Court noted that classification of an offender under the Act is a discretionary decision to be made by the trial court. The Court found no abuse of discretion in the circuit court's conclusion that the "sexual and predatory nature" of the appellant's offense made youthful offender treatment inappropriate.

Affirmed.

Robbery

State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002) (Per Curiam) (Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 310) for discussion of topic.

State v. Tyler, 211 W.Va. 246, 565 S.E.2d 368 (2002) (Per Curiam) (30-year Sentence Affirmed)

See SENTENCING Proportionality, Generally, (p. 312) for discussion of topic.

Sentences with fixed maximum periods of incarceration

Proportionality

State v. Manley, 212 W.Va. 509, 575 S.E.2d 119 (2002) (Per Curiam) (Affirmed)

See SENTENCING Proportionality, Sentences with fixed maximum period of incarceration (p. 313) for discussion of topic.

Youthful Offenders Act

State v. Brewster, ___ W.Va. ___, 579 S.E.2d 715 (No. 30598, March 18, 2003) (Per Curiam) (Affirmed)

See SENTENCING Right of allocution, (p. 317) for discussion of topic.

SENTENCING

Youthful Offenders Act (continued)

State v. Scott, ___ W.Va. ___, ___ S.E.2d ___ (No. 30692, May 7, 2003) (Starcher, J.)
(Reversed and Remanded)

See SENTENCING Credit for time served, Youthful offender act, (p. 301) for discussion of topic.

SEVERANCE

Remand of misdemeanor charges to magistrate court

State ex rel. Hoosier v. Waters, 211 W.Va. 371, 566 S.E.2d 258 (2002) (Per Curiam) (Writ of Prohibition Granted)

See MAGISTRATE COURT Right to trial in, (p. 240) for discussion of topic.

State ex rel. Games-Neely v. Sanders, 211 W.Va. 297, 565 S.E.2d 419 (2002) (Albright, J.) (Writ of Prohibition Denied)

See MAGISTRATE COURT Right to trial in, (p. 237) for discussion of topic.

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

Standards for severance

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

SEXUAL OFFENDER REGISTRATION ACT

Constitutionality under *ex post facto* principles

Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001) (Maynard, J.) (Denial of Writ Affirmed)

See *EX POST FACTO* Sexual offender registration act, (p. 169) for discussion of topic.

SEXUAL OFFENSES

Competency evaluation of victim

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Evidence

Admissibility of hearsay

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

Standards for admission of scientific test

State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Davis, C.J.) (Reversed and Remanded)

See JUDGES Improper comments to jury, (p. 208) for discussion of topic.

SIXTH AMENDMENT

Right to counsel of choice

State ex rel. Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002) (Albright, J.)
(Writ of Prohibition Granted)

See ATTORNEYS Right to counsel of choice, (p. 70) for discussion of topic.

STATUTES

Absent without leave (AWOL) statute

Criminal penalty unconstitutional

State ex rel. Games-Neely v. Sanders, 212 W.Va. 710, 575 S.E.2d 320 (2002) (Albright, J.) (Writ of Prohibition Denied)

See STATUTES State statute as violation of united states constitution, (p. 325) for discussion of topic.

Agreement on detainees

State v. Seenes, 212 W.Va. 353, 572 S.E.2d 876 (2002) (Per Curiam) (Reversed and Remanded)

See AGREEMENT ON DETAINERS Time limits, (p. 29) for discussion of topic.

Time limits

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

See AGREEMENT ON DETAINERS Time limits, (p. 27) for discussion of topic.

Constitutionality

State ex rel. Games-Neely v. Sanders, 212 W.Va. 710, 575 S.E.2d 320 (2002) (Albright, J.) (Writ of Prohibition Denied)

See STATUTES State statute as violation of united states constitution, (p. 325) for discussion of topic.

State ex rel. Riley v. Rudloff, 212 W.Va. 767, 575 S.E.2d 377 (2002) (Davis, C.J.) (Writ of Prohibition)

See PRISON/JAIL CONDITIONS Right of inmate to mental health treatment, (p. 268) for discussion of topic.

False swearing

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

STATUTES

Generally

State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) (Per Curiam) (Affirmed)

See DRIVING WHILE REVOKED Use of foreign revocation to support conviction, (p. 133) for discussion of topic.

Jury interrogatories

Prohibited in criminal cases

State v. Dilliner, 212 W.Va. 135, 569 S.E.2d 211 (2002) (Maynard, J.) (Reversed and Remanded)

See JURY Jury interrogatories, Prohibited in criminal cases, (p. 226) for discussion of topic.

Legislative intent

State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) (Per Curiam) (Affirmed)

See DRIVING WHILE REVOKED Use of foreign revocation to support conviction, (p. 133) for discussion of topic.

Mandatory connotation of “shall”

Games-Neely ex rel. W.Va. State Police v. Real Property, 211 W.Va. 236, 565 S.E.2d 358 (2002) (Albright, J.) (Forfeiture of Real Property Reversed)

See FORFEITURE Service of process on owners, (p. 173) for discussion of topic.

State statute as violation of United States Constitution

State ex rel. Games-Neely v. Sanders, 212 W.Va. 710, 575 S.E.2d 320 (2002) (Albright, J.) (Writ of Prohibition Denied)

The respondent Winn was a member of the West Virginia Air National Guard. Winn failed to attend a number of required unit assemblies. Accordingly, he was demoted and disciplined by the Air National Guard.

Winn was also charged in a criminal complaint with a violation of *W.Va. Code*, § 15-1E-87(b) of being absent without leave (“AWOL”) at his required training exercises. Although he satisfactorily completed his military-imposed discipline, the criminal complaint remained pending in the magistrate court of Berkeley County.

STATUTES

State statute as violation of United States Constitution (continued)

State ex rel. Games-Neely v. Sanders (continued)

Winn filed a writ of prohibition with the circuit court, arguing that § 15-1E-87(b) constituted an improper violation of the supremacy and militia clauses of the United States Constitution. The circuit court agreed, holding that § 15-1E-87(b) was unconstitutional, and dismissed the charges. The prosecuting attorney filed for a writ of prohibition to bar enforcement of the circuit court's order.

Syllabus Point 3 - The provisions of West Virginia Code § 15-1E-87(b) (1998) (Repl. Vol. 2000) are unconstitutional because they violate the militia clauses of Article I, Section 8 of the United States Constitution.

The Court noted that under Article I, Section 8 of the United States Constitution, Congress was designated the power to provide for organizing, arming and disciplining the militia. The Court observed that under § 15-1E-87(a), a person who had gone AWOL is to be punished "as a court-martial may direct." The Court examined the federal court-martial provisions, noting that nothing in the provisions permitted the imposition of a jail sentence as a punishment for AWOL offenders.

Since § 15-1E-87(b) exceeded the congressionally-directed court-martial provisions of 32 U.S.C. § 326, the statute was an unconstitutional infringement upon the powers delegated to Congress.

Writ of Prohibition Denied.

Statutory construction

Legislative intent

Butcher v. Miller, 212 W.Va. 13, 569 S.E.2d 89 (2002) (Per Curiam) (Reversed)

See DRIVING UNDER THE INFLUENCE Revocation of license, Refusal of designated chemical test, (p. 130) for discussion of topic.

Unit of prosecution

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

STATUTORY CONSTRUCTION

Agreement on detainees

State v. Gamble, 211 W.Va. 125, 563 S.E.2d 790 (2001) (McGraw, C.J.) (Affirmed)

See AGREEMENT ON DETAINERS Time limits, (p. 27) for discussion of topic.

Clear and unambiguous terms

Butcher v. Miller, 212 W.Va. 13, 569 S.E.2d 89 (2002) (Per Curiam) (Reversed)

See DRIVING UNDER THE INFLUENCE Revocation of license, Refusal of designated chemical test, (p. 130) for discussion of topic.

Constitutionality

Generally

Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001) (Maynard, J.) (Denial of Writ Affirmed)

See *EX POST FACTO* Sexual offender registration act, (p. 169) for discussion of topic.

For false swearing

State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002) (Albright, J.) (Writ of Prohibition Granted)

See DOUBLE JEOPARDY Multiple punishment, (p. 119) for discussion of topic.

Legislative intent

Butcher v. Miller, 212 W.Va. 13, 569 S.E.2d 89 (2002) (Per Curiam) (Reversed)

See DRIVING UNDER THE INFLUENCE Revocation of license, Refusal of designated chemical test, (p. 130) for discussion of topic.

STIPULATIONS

Driving under the influence

State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001) (Starcher, J.) (Affirmed in Part, Reversed in Part, and Remanded)

The Court re-visited *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999) in holding that once a defendant has stipulated to a prior conviction as an element of an offense, the trial court cannot permit reference to evidence of the prior conviction or the defendant's stipulation to the element of the offense.

In this case, despite the defendant's stipulation to his prior DUI "status" convictions, the prior convictions were mentioned nine times in the presence of the jury.

The Court also stated (1) that the holding of *Nichols* encompassed the charge of driving while revoked for DUI under West Virginia Code § 17B-4-3 (b) [1999], and (2) that upon request of a defendant, the trial of DUI charges and driving while revoked for DUI charges should ordinarily be severed, when such severance is necessary to avoid unfair prejudice.

Syl. pt. 2 - A criminal defendant's stipulation to a prior conviction status element of an offense, made pursuant to Syllabus Point 3 of *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999), is to be treated in the same fashion as other evidence that shows the status element, and is not to be mentioned to the jury.

Syl. pt. 3 - When a criminal defendant has stipulated to a prior conviction status element of an offense pursuant to [*Nichols*], the court should craft its remarks and instructions to the jury, including informing the jury of the charge against the defendant and the verdict form, in a fashion that omits reference to stipulated-to status elements of the offense, and that authorizes the jury to deliberate with respect to and base its verdict upon those elements of the offense that are not stipulated to by the defendant.

Syl. pt. 4 - The status element stipulation and bifurcation provisions of [*Nichols*] apply to the trial of cases charging a violation of *W.Va. Code*, § 17B-4-3(b) [1999], driving while one's driver's license has been revoked for DUI.

Syl. pt. 5 - When requested by the defendant, the trial of DUI charges and driving while revoked for DUI charges under *W.Va. Code*, § 17B-4-3(b) [1999] should ordinarily be severed, when such severance is necessary to avoid unfair prejudice.

STIPULATIONS

Driving under the influence (continued)

State v. Evans, 210 W.Va. 229, 557 S.E.2d 283 (2001) (Per Curiam) (Reversed and Remanded)

The defendant was charged with DUI-3rd Offense and Driving on a Revoked License-DUI related - 3rd Offense. Prior to trial, the defendant agreed to stipulate to the predicate prior offenses. Despite his stipulation, the prosecution repeatedly referred to the prior convictions in opening statements, the state's case-in-chief, and during cross-examination of the defendant.

The Court reversed the defendant's convictions. The Court noted the applicability of *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999) and *State v. Dews*, 209 W.Va. 500, 549 S.E.2d 694 (2001), and held that the admission of the defendant's prior convictions following the stipulation was erroneous and required reversal.

Syl. pt. 1 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

Syl. pt. 2 - "When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled." Syllabus Point 3, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999).

State v. Haden, ___ W.Va. ___, 582 S.E.2d 732 (No. 30650, February 28, 2003) (Per Curiam) (Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Severance of driving while revoked charge, (p. 131) for discussion of topic.

Effect in abuse/neglect proceedings

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Abuse and neglect

Abandonment

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

Fraudulent schemes

State v. Braham, 211 W.Va. 614, 567 S.E.2d 624 (2002) (Starcher, J.) (Reversed)

The appellant, a patron at a Morgantown bar, cashed a number of “post-dated” checks at the bar. The appellant did not have sufficient funds on deposit in his account to cover the checks. The appellant was charged with violating *W.Va. Code*, § 61-3-24d, the “fraudulent schemes” statute.

One month before the appellant’s trial, the prosecution and counsel for the appellant agreed to an evidentiary deposition of one of the state’s witnesses. Just prior to the trial, however, the prosecution advised the appellant that the witness had apparently lied in her deposition. Despite the appellant’s objections, the deposition was nonetheless played to the jury.

At trial, the appellant attempted to introduce evidence tending to show that he had not made good on the checks because the bar had not paid him certain winnings on illegal gambling machines. The state opposed the introduction of this evidence as irrelevant and as Rule 404(b) “bad acts” evidence of the alleged victim.

On appeal, the appellant claimed (1) that admission of the deposition was error; (2) that a conviction under § 61-3-24d could not be maintained on “post-dated” checks; and (3) that he should have been permitted to introduce evidence of his transactions with the bar.

The Court held, and the state conceded, that admission of the deposition of the witness was reversible error, because the appellant was effectively prohibited from confronting the witness and challenging her credibility. The Court also held that while a conviction could be maintained under § 61-3-24d on “post-dated” checks, the state had provided insufficient evidence in the case to prove, beyond a reasonable doubt, that the appellant had the requisite criminal intent to support a conviction. The Court noted that the prosecutor’s evidence on this issue was simply the fact of the check’s issuance.

Syl. - The uttering of a post-dated check may be evidence in support of a charge of violating *W.Va. Code*, 61-3-24d [1995], where the post-dated check was used for fraudulent scheme purposes and with criminal intent.

SUFFICIENCY OF EVIDENCE

Fraudulent schemes (continued)

State v. Braham (continued)

The Court also held that evidence of the appellant's dealings with the bar, and in particular the evidence indicating that the appellant believed that he was owed money by the bar, should have been introduced because such evidence might have had some bearing on the presence (or lack) of criminal or fraudulent intent.

Homicide

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

Self-defense

State v. Headley, 210 W.Va. 524, 558 S.E.2d 324 (2001) (Per Curiam) (Conviction Vacated)

See DEFENSES Self-defense, Test for, (p. 107) for discussion of topic.

Intent to deliver

State v. Williams, 210 W.Va. 583, 558 S.E.2d 582 (2001) (Per Curiam) (Conviction Affirmed)

See SEARCH AND SEIZURE Stop and frisk, Grounds for warrantless search, (p. 297) for discussion of topic.

Murder

State v. Flipppo, 212 W.Va. 560, 575 S.E.2d 170 (2002) (Davis, C.J.) (Affirmed)

See SEARCH AND SEIZURE Consent, Implied consent to search, (p. 293) for discussion of topic.

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Sexual offenses

Second degree sexual assault

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

Standard of review

State v. Vetromile, 211 W.Va. 223, 564 S.E.2d 433 (2002) (Per Curiam) (Conviction Affirmed)

See JURY Misconduct, (p. 228) for discussion of topic.

Self-defense

State v. Headley, 210 W.Va. 524, 558 S.E.2d 324 (2001) (Per Curiam) (Conviction Vacated)

See DEFENSES Self-defense, Test for, (p. 107) for discussion of topic.

To support conviction

State v. Johnson, 210 W.Va. 404, 557 S.E.2d 811 (2001) (Per Curiam) (Affirmed)

See HEARSAY Exceptions, Residual exception, (p. 185) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Abuse and neglect

Abandonment

In re: Destiny Asia H., 211 W.Va. 481, 566 S.E.2d 618 (2002) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Abandonment, What constitutes, (p. 1) for discussion of topic.

Adjudicatory hearing required

In re: Kyiah P. and Joseph P., ___ W.Va. ___, 582 S.E.2d 871 (No. 30971, May 21, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT When adjudicatory hearing required, (p. 2) for discussion of topic.

Adjudicatory hearing *not* required

In re: Kristopher E. and Kenneth C. E., 212 W.Va. 393, 572 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Adjudication not required, (p. 343) for discussion of topic.

Findings required

In re: Tonjia M., 212 W.Va. 443, 573 S.E.2d 354 (2002) (Per Curiam) (Affirmed)

See ABUSE AND NEGLECT Findings required, (p. 11) for discussion of topic.

Oral relinquishment of parental rights

In re: Tessla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Abuse and neglect (continued)

Voluntary relinquishment

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

Agreement relinquishing parental rights

Hearing on motion to set aside

State ex rel. Rose L. et al. v. Pancake, 209 W.Va. 188, 544 S.E.2d 403 (2001) (Starcher, J.) (Writ of Prohibition Denied)

See ABUSE AND NEGLECT Agreement relinquishing parental rights, Hearing on motion to set aside, (p. 3) for discussion of topic.

Based upon drug usage by parent

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

Based upon failure to protect

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

“Best interests” of children

In re: Frances J.A.S., et. al., ___ W.Va. ___, ___ S.E.2d ___ (No. 30909 & 30910, June 18, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Change of custody, (p. 3) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Change of custody

In re: Frances J.A.S., et. al., ___ W.Va. ___, ___ S.E.2d ___ (No. 30909 & 30910, June 18, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT Change of custody, (p. 3) for discussion of topic.

Continuing obligation to pay child support

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

An abuse/neglect petition was filed against the appellant, Robert R., and the mother of his son, Stephen Tyler R. . An adjudicatory hearing was scheduled for April 20, 2001, but this hearing was rescheduled for June 8, 2001. At the time of the adjudicatory hearing, the appellant was incarcerated in Kentucky on an unrelated charge. The appellant had not advised the circuit court or his counsel of his whereabouts. The appellant's attorney objected to the court's intention to proceed with the adjudicatory hearing in his client's absence. At the adjudicatory hearing, and based on allegations that the appellant had used marijuana and physically abused the mother of the child in the child's presence, the court determined that the appellant had abused and/or neglected his child.

The appellant was present at the disposition hearing, where he presented evidence and requested a post-adjudicatory improvement period. The appellant also renewed his objection to the circuit court's having conducted the adjudicatory hearing outside of his presence. The circuit court denied the motion for the improvement period; terminated the appellant's parental rights; and ordered the appellant to continue to provide financial support for his son.

The appellant sought relief from the court's disposition order, alleging that the circuit court erred (1) by holding the adjudicatory hearing in his absence; (2) by concluding that he had abused/neglected his son; and (3) by requiring him to continue to pay child support after the termination of his parental rights.

In a lengthy opinion, the Court denied relief to the appellant.

The Court first addressed the appellant's argument that the circuit court had violated his due process rights by conducting the adjudicatory hearing in his absence. The Court, while acknowledging the constitutional due process rights implicated in the presence of a parent at a hearing, noted that it is in the discretion of a trial court to permit an incarcerated parent to participate in an abuse/neglect proceeding.

Syllabus Point 2 - "Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court." Syllabus point 10, *State ex rel. Jeanette H. v. Pancake*, 207 W.Va. 154, 529 S.E.2d 865 (2000).

TERMINATION OF PARENTAL RIGHTS

Continuing obligation to pay child support (continued)

In re: Stephen Tyler R. (continued)

Syllabus Point 3 - "In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors." Syllabus point 11, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000).

The Court held, in a new syllabus point, that in order for an incarcerated parent to avail themselves of these protections, the parent must notify the court of their custodial status so that the court may then determine the feasibility of the parent's attendance.

Syllabus Point 4 - In order to activate the procedural protections enunciated in Syllabus points 10 and 11 of *State ex rel. Jeanette H. v. Pancake*, 207 W.Va. 154, 529 S.E.2d 865 (2000), an incarcerated parent who is a respondent to an abuse and neglect proceeding must inform the circuit court in which such case is pending that he/she is incarcerated and request the court's permission to attend the hearing(s) scheduled therein. Once the circuit court has been so notified, by the respondent parent individually or by the respondent parent's counsel, the determination of whether to permit the incarcerated parent to attend such hearing(s) rests in the court's sound discretion.

The Court noted that the appellant had not notified the circuit court or his counsel of his incarceration at the time of the adjudicatory hearing. The Court noted that a circuit court cannot "serve as [an] omnipotent soothsayer" capable of foretelling the location of absent parties. The Court held that, "[i]n the absence of even the slightest communication of this fact to the presiding tribunal or his legal representative, we are reluctant to find that Mr. R. acted to invoke the safeguards necessary to protect his due process rights in this regard."

TERMINATION OF PARENTAL RIGHTS

Continuing obligation to pay child support (continued)

In re: Stephen Tyler R. (continued)

The Court similarly denied relief to the appellant regarding the issue of whether the circuit court had erred in finding that he had abused and/or neglected his son. The Court stated that evidence of the appellant's domestic violence in the presence of his infant son, coupled with evidence of drug abuse and the appellant's "unwillingness" to cooperate in family case plans, was sufficient evidence of abuse and/or neglect.

Syllabus Point 5 - "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syllabus point 1, in part, *In re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

The appellant's final assertion of error was that the circuit court erred by requiring him to continue to pay child support following the termination of his parental rights. The basis of the appellant's argument was (1) that it was fundamentally unfair to require him to pay child support for a child with whom he could no longer visit or exercise any parental rights, and (2) that it would be inequitable to require such support if his son was subsequently adopted. The Court first noted that the plain language of West Virginia Code, § 49-6-5 (a)(6) permits a court, upon a finding that a parent is abusive or neglectful and that there is no reasonable likelihood that the conditions can be corrected, to terminate the parental "rights and/or responsibilities" of the parent. The Court observed that a "parent's duty to support his/her child(ren) has long been recognized to be an integral part of the rubric of parental responsibilities." Thus, a court can terminate a either parent's parental rights; their parental responsibilities; or both such rights and responsibilities.

The Court further reiterated that "the duty to pay child support and the right to exercise visitation are not interdependent", *Carter v. Carter*, 198 W.Va. 171, 177, 479 S.E.2d 681, 687 (1996), and noted that the emphasis on the children's right to receive support, rather than on visitation privileges, is based on the fact that such payments are exclusively for the benefit and economic best interest of the child.

Syllabus Point 7 - Pursuant to the plain language of *W. Va. Code* § 49-6-5(a)(6) (1998) (Repl. Vol. 2001), a circuit court may enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren)subject thereto.

The Court also noted that in order to avoid potential inequities involved in paying child support following a subsequent adoption of a child, the appellant could seek modification of the dispositional order.

TERMINATION OF PARENTAL RIGHTS

Continuing obligation to pay child support (continued)

In re: Stephen Tyler R. (continued)

Syllabus Point 8 - A circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with *W.Va. Code* § 49-6-6 (1977) (Repl. Vol. 2001), amend a parent's continuing child support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.

Affirmed.

Criminal activity

Based upon drug usage by parent

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

Effect of

In re: Brian James D., 209 W.Va. 537, 550 S.E.2d 73 (2001) (Per Curiam) (Reversed and Remanded)

The Court determined that the decision of the circuit court to terminate the parental rights of a parent based solely on the parent's admission to selling marijuana was erroneous. Finding that "incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights", the Court remanded the case for the determination of a case plan for reunification.

Syl. pt. 1 - "Although conclusions of law reached by a trial court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany S. Marie*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

TERMINATION OF PARENTAL RIGHTS

Criminal activity (continued)

Effect of (continued)

In re: Brian James D. (continued)

Syl. pt. 2 - “A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.’ Syllabus Point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970).” Syllabus Point 7, *In re: Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000).

Duty of DHHR as to other children

In re: Kyjah P. and Joseph P., ___ W.Va. ___, 582 S.E.2d 871 (No. 30971, May 21, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT When adjudicatory hearing required, (p. 2) for discussion of topic.

Effect of oral relinquishment

In re: Tessla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

The Department of Health and Human Resources (DHHR) initiated an abuse and neglect petition against Bonita W., who was the mother of two children. At a post-adjudicatory status hearing, counsel for the mother advised the court that his client had indicated that she wished to voluntarily relinquish custody of her children. After questioning by the court and the attorney, the court determined that the relinquishment sought was “reasoned and voluntary”, and accordingly terminated the mother’s parental rights pursuant to the relinquishment.

Three months later, the mother filed a motion to set aside the relinquishment, claiming (1) that the relinquishment was invalid because it was not formalized in writing, as required by West Virginia Code, § 49-6-7, and (2) that the relinquishment was made under duress, and thus invalid. The court denied this motion.

The Court’s primary focus on appeal was the issue of whether an oral relinquishment of parental rights is valid when not followed by a written relinquishment. The Court reviewed this issue by comparing § 49-6-7 with the provisions of the Rules of Procedure for Child Abuse and Neglect Proceedings. The Court determined that the primary focus of § 49-6-7 was on relinquishments obtained in “extrajudicial settings”, *i.e.*, a DHHR office. The Court held that when oral relinquishments are accomplished on the record, in open court, that a “duly acknowledged writing” is not required.

TERMINATION OF PARENTAL RIGHTS

Effect of oral relinquishment (continued)

In re: Tesla N.M. (continued)

Syl. pt. 1 - Pursuant to Rule 35(a)(1) of the West Virginia Rules of Procedure for Child Abuse and Neglect, an oral voluntary relinquishment of parental rights is valid if the parent who chooses to relinquish is present in court and the court determines that the parent understands the consequences of a termination of parental rights, is aware of less drastic alternatives than termination, and is informed of the right to a hearing and to representation by counsel.

Syl. pt. 2 - An oral voluntary relinquishment of parental rights made on the record in open court is valid regardless of whether the parent who chooses to terminate his or her rights executes and submits a duly acknowledged writing pursuant to *W. Va. Code* § 49-6-7.

The Court also determined that there was no merit to the appellant's allegation that the relinquishment was accomplished by duress was not substantiated by the record. The Court noted the appellant's responses to the questions put to her by the court (and her attorney) at the time of the relinquishment, and held that there was no abuse of discretion in denying the appellant the right to withdraw the relinquishment.

Effect of prior termination of parental rights

In re: Rebecca K.C., ___ W.Va. ___, 579 S.E.2d 718 (No. 30599, March 24, 2003) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Effect of prior termination of parental rights, (p. 5) for discussion of topic.

Effect of stipulations of abuse/neglect

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Evidentiary standards

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Evidentiary standards (continued)

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Findings required

In re: Edward B., 210 W.Va. 621, 558 S.E.2d 620 (2001) (Albright, J.) (Reversed and Remanded with Directions)

The appellant, Patricia J., was the mother of several children. Proceedings were initiated against the appellant in March 2000 alleging the neglect of her children. She was adjudicated as a neglectful parent on June 26, 2000. A motion for a post-adjudicatory improvement period was filed, to which neither the state nor the DHHR objected to at the dispositional hearing. A psychologist consulted by the appellant requested a four-week period to assess the appellant's abilities to respond to counseling and medication; the court, however, refused to delay the dispositional hearing for this purpose. Following the dispositional hearing, the court terminated the appellant's parental rights as to one of the children and transferred legal and physical custody of the remaining children to their father.

The Court ruled that the trial court had failed to make sufficient findings of fact in its dispositional order to support the termination and transfer of custody. The Court noted violations of provisions of the West Virginia Code and the Rules of Procedure for Child Abuse and Neglect Proceedings.

Syl. pt. 4 - Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2000) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an allegedly neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

Syl. pt. 5 - Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

TERMINATION OF PARENTAL RIGHTS

Involuntary termination

Duty of DHHR as to other children

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

Less restrictive alternatives

In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) (Per Curiam) (Termination of Parental Rights Affirmed)

See ABUSE AND NEGLECT Termination of parental rights, Based on drug usage by parent, (p. 17) for discussion of topic.

Modification of dispositional orders

In re: Stephen Tyler R., ___ W.Va. ___, ___ S.E.2d ___ (No. 30654, July 1, 2003) (Davis, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Continuing obligation to pay child support, (p. 335) for discussion of topic.

Relinquishment under duress

In re: Tessla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

Standard of review

Criminal activity

In re: Brian James D., 209 W.Va. 537, 550 S.E.2d 73 (2001) (Per Curiam) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Criminal activity, Effect of, (p. 338) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Visitation standards

In re: Tyler D., Alexander A., and Nevaeh D., ___ W.Va. ___, 578 S.E.2d 343 (No. 30908, February 20, 2003) (Per Curiam) (Reversed and Remanded with Directions)

See ABUSE AND NEGLECT Failure to protect from harm by another, (p. 7) for discussion of topic.

Voluntary relinquishment of parental rights

Adjudicatory hearing not required

In re: Kristopher E. and Kenneth C. E., 212 W.Va. 393, 572 S.E.2d 916 (2002) (Per Curiam) (Reversed and Remanded)

The appellant was the father of two children and was granted sole custody of the children following a divorce. After the divorce, the children began exhibiting severe behavioral problems, including acts of delinquency and violent episodes towards the appellant and his new wife. The appellant sought professional assistance in regard to his children, but little improvement was noted.

In May 2001, while the appellant was out-of-state, the children's stepmother sought assistance from the prosecuting attorney and the Department of Health and Human Resources (DHHR). The stepmother indicated that she was likely to "beat or switch" one of the children if the children remained in the home. When the appellant was contacted about this situation in California, the appellant concurred in the removal of the children from the home. The children were removed from the home and an abuse/neglect petition was filed the same day.

During the abuse/neglect proceedings, the appellant indicated his willingness to voluntarily relinquish custody of the children. The trial court found this surrender to be appropriate, but concluded that an adjudication was necessary. Consequently, the court adjudicated the appellant as an abusive and neglectful parent.

The appellant asserted on appeal that the termination of custody should have been pursuant to the voluntary relinquishment, and not pursuant to an adjudication.

The Court noted that the trial court had rendered its decision on November 1, 2001, some seven months prior to the Court's decision in *In Re: James G. and Emmett M. L., III*, 211 W.Va. 339, 566 S.E.2d 226 (No. 30039, June 13, 2002). This case recognized that a trial court has authority to accept a parent's voluntary relinquishment of parental rights without having to adjudicate the underlying abuse and neglect action.

TERMINATION OF PARENTAL RIGHTS

Voluntary relinquishment of parental rights (continued)

Adjudicatory hearing not required (continued)

In re: Kristopher E. and Kenneth C. E. (continued)

Citing *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), the Court held that while it was a “very close case”, the trial court’s conclusion that the appellant had abused and/or neglected was erroneous. The Court noted the lack of actual physical harm to the children, and the “extraordinary means” to which the appellant and his wife had gone to cope with the children’s behavioral disorders in a “socially accepted manner”.

Accordingly, the Court held that the adjudication should be reversed, and that the appellant’s parental rights could be terminated in accordance with the voluntary relinquishment agreement.

Reversed and Remanded.

Effect of DHHR objection to voluntary termination

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

Abuse and neglect proceedings were instituted against Victoria M., the mother of two children, based on a number of referrals to the Department of Health and Human resources (DHHR). After the mother was adjudicated as an abusive/neglectful parent, a final dispositional hearing was scheduled. At this hearing, the mother presented the court with a written voluntary relinquishment of her parental rights.

The court refused to accept the voluntary relinquishment. The court’s rationale was that the DHHR did not consent to the voluntary relinquishment, and that the court could not force DHHR to agree to this “settlement”. The court then proceeded to involuntarily terminate the parental rights of Victoria M., finding in its order that “the Department shall not be required to accept the voluntary relinquishment of the respondent mother.”

On appeal, the appellant did not seek reinstatement of her parental rights, but claimed only that the court erred in not accepting her offer of a voluntary relinquishment.

TERMINATION OF PARENTAL RIGHTS

Voluntary relinquishment of parental rights (continued)

Effect of DHHR objection to voluntary termination (continued)

In re: James G. (continued)

The Court observed that the consent of the DHHR was not required for the court to accept the mother's voluntary relinquishment. The Court noted the DHHR's apparent motive in objecting to a voluntary relinquishment: that if an involuntary relinquishment were ordered, the DHHR would have a duty, under § 49-6-5b (1998) to file an abuse/neglect petition regarding any other children that the mother might have. If, however, the termination were considered voluntary, the DHHR would have no absolute duty under § 49-6-5b to act in the interests of any other children.

The Court dispensed with this argument, noting that even if §49-6-5b is not implicated, there is nothing to prevent the DHHR from providing services, investigating, or filing a petition in the event of future abusive or neglectful actions. The Court held that there is nothing in the relevant statutes which mandates the consent of the DHHR to a voluntary relinquishment, and that a court must exercise its discretion in determining whether to accept such relinquishments.

Syl. pt. 1 - "When the parental rights of a parent to a child have been involuntarily terminated, *W. Va. Code*, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child." Syl. pt. 1, *In re: George Glen B. Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000).

Syl. pt. 2 - "While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in *W. Va. Code*, 49-6-5b(a)(3) [1998], the Department must still comply with the evidentiary standards established by the Legislature in *W. Va. Code*, 49-6-2 [1996] before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in *W. Va. Code*, 49-6-3 [1998] before a court may grant the Department the authority to take emergency, temporary custody of a child." Syl. pt. 2, *In re: George Glen B. Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000).

Syl. pt. 3 - In the context of an abuse and neglect proceeding, a court may accept a parent's voluntary relinquishment of parental rights without the consent of the West Virginia Department of Health and Human Resources, provided that the agreement meets the requirements of *W. Va. Code* § 49-6-7 (1977), where applicable, and the relevant provisions of the Rules of Procedure for Abuse and Neglect Proceedings.

TERMINATION OF PARENTAL RIGHTS

Voluntary relinquishment of parental rights (continued)

Effect of DHHR objection to voluntary termination (continued)

In re: James G. (continued)

Syl. pt. 4 - A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.

The Court held that the court had not exercised its discretion, but had erroneously viewed itself as bound by the non-acquiescence of the DHHR.

Effect of prior voluntary relinquishment

In re: Kyiah P. and Joseph P., ___ W.Va. ___, 582 S.E.2d 871 (No. 30971, May 21, 2003) (Per Curiam) (Reversed and Remanded)

See ABUSE AND NEGLECT When adjudicatory hearing required, (p. 2) for discussion of topic.

When required to be in writing

In re: Tesla N.M., 211 W.Va. 334, 566 S.E.2d 221 (2002) (Maynard, J.) (Affirmed)

See TERMINATION OF PARENTAL RIGHTS Effect of oral relinquishment, (p. 339) for discussion of topic.

Voluntary v. involuntary termination

In re: James G., 211 W.Va. 339, 566 S.E.2d 226 (2002) (McGraw) (Reversed and Remanded)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Effect of DHHR objection to voluntary termination, (p. 344) for discussion of topic.

“THREE TERM” RULE

Application of interstate agreement on detainers

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

Generally

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

The appellant, while incarcerated in a federal prison, was indicted in Jackson County on unrelated charges in June 1999. Pursuant to the Interstate Agreement on Detainers (“IAD”), the State filed a formal detainer with the federal facility.

On December 11, 2000, the appellant filed a formal request for disposition of the Jackson County charges. On April 20, 2001, the trial court set a trial date of May 29, 2001 and appointed counsel for the appellant.

On May 16, 2001 the appellant filed a motion for dismissal of the indictment because the appellant had not been tried within three terms of court since he was indicted. This motion was denied by the trial court.

On May 29, 2001 the appellant was arraigned on the indictment and trial began. Following opening statements, however, the appellant chose to plead guilty to a single count each of burglary and petit larceny, in exchange for the State’s recommendation that his sentences be served concurrently with an unrelated Wirt County sentence.

At the appellant’s sentencing hearing on July 14, 2001, the trial court sentenced the appellant to one to fifteen years on the burglary charge, and one year in jail on the petit larceny charge. While these sentences were ordered to be served concurrently to one another, they were ordered to run consecutively to the appellant’s federal term and his Wirt County sentence.

The appellant made five primary assignments of error: (1) that the trial court had failed to properly arraign him and appoint counsel to represent him; (2) that the trial court had improperly held hearings in his absence; (3) that his counsel was not provided sufficient time to prepare for trial; (4) that the trial court erred in not accepting the State’s recommendation regarding the imposition of sentence; and (5) that his sentence was disproportionate to the sentence of his co-defendant.

The Court denied relief on each of these assignments and affirmed the appellant’s conviction and sentence.

“THREE TERM” RULE

Generally (continued)

State v. Damron (continued)

The Court first determined that the State had fully complied with the IAD, primarily in promptly filing its detainer and in providing the appellant with a trial date within the 180-day rule provided under the IAD. The Court further noted that the appellant had been tried immediately after his arraignment, which is the trigger for the application of the three-term rule.

Syllabus Point 1 - “Pursuant to *W. Va. Code* § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute.” Syllabus, *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998).

The Court also held that the appellant was not denied his right to be present at all critical stages of the proceedings. The appellant was not present at four separate hearing held between October 2000 and April 2001. The Court noted that these hearing were primarily status and/or scheduling hearings, and that the appellant was not prejudiced by his absence from these hearings.

Syllabus Point 2 - “In a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs.” Syllabus Point 3, *State ex rel. Redman v. Hedrick*, 185 W. Va. 709, 408 S.E.2d 659 (1991).

The Court quickly disposed of the appellant’s claim that his attorney had insufficient time to prepare for trial, noting that counsel had 40 days in which to prepare for trial, and in fact had indicated to the court that he was “ready for trial.”

The Court determined that the trial court had not erred by failing to accept the State’s sentencing recommendation of in permitting the appellant to withdraw his plea. The Court cited the plea colloquy between the trial court and the appellant, noting that the trial court had followed the mandates of Rule 11(e)(2) by informing the appellant that if the court chose not to accept the sentencing recommendation, the appellant could not withdraw his plea.

“THREE TERM” RULE

Generally (continued)

State v. Damron (continued)

Syllabus Point 3 - “A trial court has two options to comply with the mandatory requirements of Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure. It may initially advise the defendant at the time the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea. As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea.” Syllabus Point 2, *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986).

Finally, the Court held that the appellant’s sentence was not constitutionally disproportionate to the sentence received by his co-defendant. The Court observed that the State had chosen not to prosecute the co-defendant following his agreement to testify against the appellant. The Court held that the defendants were not “similarly situated”, determining that the appellant had instigated the crimes and, as the co-defendant’s employer, had threatened to fire the co-defendant if he did not assist him in the crimes.

Syllabus Point 4 - “Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.” Syllabus Point 2, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984).

Affirmed.

Period begins on arraignment date

State v. Damron, ___ W.Va. ___, 576 S.E.2d 253 (No. 30530, December 4, 2002) (Per Curiam) (Affirmed)

See THREE-TERM RULE Generally, (p. 347) for discussion of topic.

TRANSFERRING STOLEN PROPERTY

Essential elements

State v. Anderson, 212 W.Va. 761, 575 S.E.2d 371 (2002) (Per Curiam) (Reversed)

See INSTRUCTIONS Failure to instruct on essential element, (p. 199) for discussion of topic.

TRESPASSING

Essential elements

State v. Srnsky, et. al., ___ W.Va. ___, 582 S.E.2d 859 (No. 30896, May 16, 2003) (Albright, J.) (Reversed)

See OBSTRUCTING AN OFFICER What constitutes obstruction, Failure to identify not obstruction, (p. 250) for discussion of topic.

TRIAL

Prosecuting attorney

Improper comments to jury

State v. Copen, 211 W.Va. 501, 566 S.E.2d 638 (2002) (Per Curiam) (Affirmed)

See EVIDENCE Gruesome photographs, Admissibility, (p. 151) for discussion of topic.

State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Potential bias/prejudice, (p. 224) for discussion of topic.

State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002) (Per Curiam) (Reversed and Remanded)

See JURY Grounds for disqualification, Juror bias/prejudice, (p. 220) for discussion of topic.

Severance of charges

State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001) (Starcher, J.) (Affirmed in Part, Reversed in Part, and Remanded)

See STIPULATIONS Driving under the influence, (p. 328) for discussion of topic.

“TWO TERM” RULE

Indictment

State ex rel. Shifflet v. Rudloff, ___ W.Va. ___, 582 S.E.2d 851 (No. 30968, May 8, 2003) (Per Curiam)

The petitioner was arrested in Berkeley County on October 3, 2001 and charged with bank robbery. The petitioner was unable to post bond and remained incarcerated. Questions subsequently arose regarding the petitioner’s competency to stand trial, and a psychologist report dated November 9, 2001 determined that the petitioner was mentally ill.

On December 7, 2001 the circuit court ordered a complete competency and criminal responsibility examination. The report indicated that the petitioner was not competent to stand trial, and the circuit court ordered the petitioner committed to Sharpe Hospital for six months. By September 26, 2002, doctors at the hospital believed that the petitioner’s condition had improved, and the petitioner was returned to the Eastern Regional Jail on October 7, 2002.

On October 29, 2002 counsel for the petitioner filed a motion to reduce the petitioner’s bond to a personal recognizance bond. The motion cited that the grand jury had met in Berkeley County on four separate occasions since the time of the petitioner’s arrest, but that the grand jury had not indicted the petitioner for any crime. The petitioner thus asserted that the lack of an indictment violated the “two-term” rule encompassed in *W.Va. Code*, § 62-2-12 (1923). The circuit court denied this motion on November 13, 2002, and the petitioner filed an emergency petition for writ of habeas corpus with the Supreme Court of Appeals.

The Court began its analysis by noting that after the filing of the petition herein but before oral arguments were presented, the petitioner was indicted for bank robbery by a special term of the Berkeley County grand jury. The Court noted that because the issue was an issue of “great public interest” the issue was not moot and required examination.

Syllabus Point 3 - “Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.” Syl. pt. 1, *Israel by Israel v. W.Va. Secondary Schools Activities Com’n*, 182 W.Va. 454, 388 S.E.2d 480 (1989).

“TWO TERM” RULE

Indictment (continued)

State ex rel. Shifflet v. Rudloff (continued)

The Court held that under the plain and unambiguous language of § 62-2-12, because the petitioner was incarcerated, he was entitled to be indicted within two terms of court. The Court rejected the arguments of the State that (1) the delay in indictment was attributable to the defense counsel’s request for a competency evaluation, and (2) the time limit for the State to indict the petitioner was “tolled” for the time period that the petitioner was hospitalized for his mental illness.

Syllabus Point 5 -“A person who has been committed to jail on a criminal offense, to answer an indictment which may be returned against him by the court, to which he is held, will be discharged by writ of habeas corpus from further imprisonment on that charge, if he be not indicted before the end of the second term of court, unless it appear that material witnesses for the state have been enticed or kept away, or are prevented from attendance by sickness or inevitable accident.” Syllabus, *Ex parte Blankenship*, 93 W.Va. 408, 116 S.E. 751 (1923).

Writ of Habeas Corpus Granted.

WAIVER

Right to counsel

State v. McCraine, ___ W.Va. ___, ___ S.E.2d ___ (No. 30592, May 16, 2003) (Albright, J.)
(Reversed and Remanded)

See DRIVING UNDER THE INFLUENCE Mandatory bifurcation of prior offenses (p. 127) for discussion of topic.

WANTON ENDANGERMENT

Defined

State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001) (Albright, J.) (Affirmed in Part, Reversed in Part, and Remanded with Instructions)

See DOMESTIC VIOLENCE Enhancement of sentence, Use of out-of-state convictions, (p. 117) for discussion of topic.

WITNESSES

Competency evaluation of victim

State v. Slaton, 212 W.Va. 133, 569 S.E.2d 189, (2002) (Per Curiam) (Affirmed)

See COMPETENCY Duty of court to conduct competency hearing, (p. 82) for discussion of topic.

Discovery of witness list by prosecution

State ex rel. Sutton v. Mazzone, 210 W.Va. 331, 557 S.E.2d 385 (2001) (Per Curiam) (Writ of Prohibition Granted)

See DISCOVERY Witness list, (p. 115) for discussion of topic.

Expert witnesses

Duty to disclose expert witness information

State ex rel. Sutton v. Mazzone, 210 W.Va. 331, 557 S.E.2d 385 (2001) (Per Curiam) (Writ of Prohibition Granted)

See DISCOVERY Witness list, (p. 115) for discussion of topic.

Impeachment

State v. Martisko, 211 W.Va. 387, 566 S.E.2d 274, (2002) (Per Curiam) (Affirmed in Part, Reversed in Part, and Remanded)

See IMPEACHMENT Hearsay declarant, (p. 189) for discussion of topic.

Instructions

State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002) (Per Curiam) (Affirmed)

See INSTRUCTIONS "Missing witness" instruction, (p. 201) for discussion of topic.

WITNESSES

Unavailability

State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001) (Maynard, J.) (Reversed and Remanded)

See CONFRONTATION CLAUSE Witness unavailable, (p. 97) for discussion of topic.

Use of prior trial testimony

State v. Bohon, 211 W.Va. 277, 565 S.E.2d 399 (2002) (McGraw, J.) (Conviction Reversed)

See PRIVILEGES Marital confidence privilege, Generally, (p. 271) for discussion of topic.

YOUTHFUL OFFENDER ACT

Credit for time served

State v. Scott, ___ W.Va. ___, ___ S.E.2d ___ (No. 30692, May 7, 2003) (Starcher, J.)
(Reversed and Remanded)

See SENTENCING Credit for time served, Youthful offender act, (p. 301) for discussion of topic.

Sentencing

State v. Scott, ___ W.Va. ___, ___ S.E.2d ___ (No. 30692, May 7, 2003) (Starcher, J.)
(Reversed and Remanded)

See SENTENCING Credit for time served, Youthful offender act, (p. 301) for discussion of topic.

Standards for imposition

State v. Brewster, ___ W.Va. ___, 579 S.E.2d 715 (No. 30598, March 18, 2003) (Per Curiam) (Affirmed)

See SENTENCING Right of allocution, (p. 317) for discussion of topic.

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